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(Un)Civil Denaturalization

Cassandra Burke Robertson[†] and Irina D. Manta[‡]

Over the last fifty years, naturalized citizens in the United States were able to feel a sense of finality and security in their rights. Denaturalization, wielded frequently as a political tool in the McCarthy era, had become exceedingly rare. Indeed, denaturalization was best known as an adjunct to criminal proceedings brought against former Nazis and other war criminals who had entered the country under false pretenses.

Denaturalization is no longer so rare. Naturalized citizens' sense of security has been fundamentally shaken by policy developments in the last five years. The number of denaturalization cases is growing, and if current trends continue, they will continue to increase dramatically. This growth began under the Obama administration, which used improved digital tools to identify potential cases of naturalization fraud from years and decades ago. The Trump administration, however, is taking denaturalization to new levels as part of its overall immigration crackdown. It has announced plans for a denaturalization task force. And it is pursuing denaturalization as a civil-litigation remedy and not just a criminal sanction—a choice that prosecutors find advantageous because civil proceedings come with a lower burden of proof, no guarantee of counsel to the defendant, and no statute of limitations. In fact, the first successful denaturalization under this program was decided on summary judgment. It alleged that an asylum claim was improperly filed more than twenty-five years ago. The denaturalization judgment was granted in 2018, with the defendant never having been personally served with process and never making an appearance in the case, either on his own or through counsel. Even today, it is not clear that he knows he has lost his citizenship.

The legal status of denaturalization is murky, in part because the Supreme Court has long struggled to articulate a consistent view of citizenship and its prerogatives. Nonetheless, the Court has set a number of significant limits on the government's attempts to remove citizenship at will—limits that are inconsistent with the administration's current litigation policy. This Article argues that stripping Americans of citizenship through the route of civil litigation not only violates substantive and procedural due process, but also violates the rights guaranteed by the Citizenship Clause of the Fourteenth Amendment. Last, but not least, (un)civil denaturalization undermines the constitutional safeguards of democracy.

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(Un)Civil Denaturalization

Denaturalization is making a comeback in the United States. For half a century, denaturalization largely disappeared from American policy.¹ Civil actions seeking to strip individuals' citizenship have been exceedingly rare in the last fifty years. When they occurred, they were often the product of human rights groups' efforts to identify former Nazis and war criminals who had used forged and fraudulent credentials to avoid accountability.²

Now, however, the government has ramped up the number of denaturalization cases it is filing. News reports detail how government officials are searching through old records, digitizing fingerprint records from decades ago and looking for irregularities that might lead to new denaturalization actions.³

Immigration and Customs Enforcement (ICE) has requested funding to institute a task force aimed at bringing more civil and criminal actions against individuals who were allegedly unqualified to obtain citizenship. The program has so far identified 887 potential leads, and expects to review another 700,000 naturalized citizens' files, to see if there are grounds for potential denaturalization.⁴

These additional denaturalization proceedings might not seem like a lot given the sheer number of naturalized citizens in the country. Every year, approximately 700,000 individuals become naturalized citizens of the United States. There are nearly 20 million naturalized citizens currently residing in the United States, representing more than 6.5% of the nation's citizens.⁵ Naturalized

¹ See *infra* Part II.

² *Id.*

³ Nick Miroff, *Scanning Immigrants' Old Fingerprints, U.S. Threatens to Strip Thousands Of Citizenship*, WASH. POST (June 13, 2018), at https://www.washingtonpost.com/world/national-security/scanning-immigrants-old-fingerprints-us-threatens-to-strip-thousands-of-citizenship/2018/06/13/2230d8a2-6f2e-11e8-afd5-778aca903bbe_story.html?utm_term=.50d44e4aaa2e.

⁴ Matthew Hoppock, *Operation Janus and Operation Second Look: Denaturalization of Citizens With Removal Orders* (March 4, 2018), <https://www.hoppocklawfirm.com/operation-janus-operation-second-look-denaturalization-citizens-removal-orders/> [hereinafter "Hoppock, *Second Look*"].

⁵ Ana Gonzalez-Barrera & Jens Manuel Krogstad, *Naturalization Rate Among U.S. Immigrants Up Since 2005, With India Among The Biggest Gainers*, Pew Research Center (Jan. 18, 2018), <http://www.pewresearch.org/fact-tank/2018/01/18/naturalization-rate-among-u-s-immigrants-up-since-2005-with-india-among-the-biggest-gainers/> (providing the number of naturalized citizens); Population Distribution by Citizenship Status, Henry J Kaiser Family Foundation, <https://www.kff.org/other/state-indicator/distribution-by-citizenship-status/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22>

citizens enjoy the full benefits and responsibility of U.S. citizenship, including the right to vote in state and federal elections, the right to travel with a U.S. passport, the right and duty to serve on a jury, and legal protection against deportation proceedings.⁶ In fact, the Supreme Court has said, the only difference between the rights of naturalized citizens and those born in the United States is eligibility to serve as President.⁷

But even if the program results in only a few hundred additional proceedings, it still creates a culture of fear that permeates through the community of immigrants and naturalized citizens. As one reporter stated, “[f]ear also threads through people fast, and spreads quickly, especially online. After the immigration agency’s announcement, many naturalized citizens were left questioning the validity of an immigration status they assumed would always be safe.”⁸ People may begin second-guessing their decision to seek naturalization; “afraid of being targeted or tripped up in a lie, [they] may now never pursue naturalization at all, even if they are eligible.”⁹

This fear is compounded by denaturalization procedures. First, although U.S. attorneys often have discretion over whether to file cases in the civil or criminal justice systems, the Trump administration is increasingly relying on ordinary civil litigation to seek denaturalization. In fact, in a 2017 article in the U.S. Attorneys Bulletin, several government officials “encourage[d] Federal prosecutors to consider referring cases for civil denaturalization when a case is declined for prosecution.”¹⁰ They wrote that filing civil proceedings rather than criminal actions offers several “benefits”: civil litigation carries a lower burden of proof; there is no statute of limitations on civil denaturalization; there is no right to a jury trial; and there is no right to appointed counsel.¹¹

asc%22%7D (noting that the number of United States citizens is approximately 297 million as of 2017).

⁶ Gonzalez-Barrera & Krogstad, *supra* note 5.

⁷ Knauer v. United States, 328 U.S. 654, 658 (1946) (“Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country ‘save that of eligibility to the Presidency.’”).

⁸ Stephanie deGooyer, *Why Trump’s Denaturalization Task Force Matters*, NATION, July 10, 2018, at <https://www.thenation.com/article/trumps-denaturalization-task-force-matters/>.

⁹ *Id.*

¹⁰ Anthony D. Blanco et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, UNITED STATES ATTORNEYS’ BULLETIN 6 (July 2017) at <https://www.justice.gov/usao/page/file/984701/download>.

¹¹ *Id.* at 8.

While these factors may make denaturalization cases easier for the government to win, they also create substantial due process risks to the defendant. Two recent cases highlight the inequities arising when civil litigation puts citizenship at risk. In the first case, the defendant may be unaware even now that he has lost his citizenship. Because he was not personally served, we do not know whether he had actual notice of the denaturalization proceeding against him.¹² At any rate, he did not show up to the hearing, and no attorney entered an appearance on his behalf. As a result, the government was able to obtain a summary judgment granting denaturalization.¹³ In the second case, the defendant pleaded guilty to helping her boss commit financial fraud.¹⁴ Although it is undisputed that the defendant played only a very minor role in her boss' underlying fraud, did not personally benefit from it, and helped the FBI build a case against her employer, the government nevertheless contends that her plea demonstrates that she lacks the good moral character necessary to qualify for citizenship.

This Article explores denaturalization's uneasy fit into civil litigation. It examines the history of denaturalization policy and how the Supreme Court's constitutional jurisprudence pushed back against statutory encroachments on citizenship rights. It argues that even though the Supreme Court has more recently applied a more limited and textualist approach to denaturalization cases, civil denaturalization contradicts the due-process guarantee that the Court has developed in other contexts. The Article concludes that civil denaturalization violates both the procedural and substantive due process guarantees of the Fourteenth Amendment and that it is fundamentally inconsistent with the democratic framework established by the United States Constitution.

The Article proceeds as follows: Part I explains current denaturalization law and policy, and it explores how that law and policy plays out in recent denaturalization actions. Part II looks at the historical basis of denaturalization actions. It examines how the government's denaturalization policy expanded during the early part of the twentieth century, as well as how it declined in the years after the Red Scare. Part III turns to the constitutional law of denaturalization. It analyzes the changing limits that the Supreme Court has put on denaturalization actions over time, and concludes that the Court has struggled to articulate a consistent view of citizenship rights. Finally, Part IV examines how current denaturalization law and policy fit within the constitutional structure set out in the Supreme Court's jurisprudence. It argues that civil denaturalization actions do not comport with constitutional protections: first, civil denaturalization

¹² See *infra* Part I.B.i.

¹³ See *infra* Part I.

¹⁴ See *infra* Part I.B.ii.

actions violate procedural due process requirements; second, civil denaturalization actions contravene both the Citizenship Clause and the substantive due process protections offered by the Fourteenth Amendment; and finally, such actions undermine constitutional protections of citizen sovereignty.

I. The Renewed Threat of Denaturalization

Although denaturalization was a relatively common action during the first half of the twentieth century, it has been used exceedingly rarely since 1967. That year, the Supreme Court effectively limited the potential grounds for denaturalization to fraud and illegal procurement.¹⁵ In the years after that, denaturalization was rarely used even when it was statutorily authorized. Instead, the Department of Justice used its prosecutorial authority primarily to seek the denaturalization of former Nazi officials and other war criminals, and did not typically go after more ordinary cases. Now, however, the number of denaturalization cases is growing and gaining significant public attention.¹⁶

There are two primary mechanisms for seeking denaturalization under current law.¹⁷ The first is through a criminal naturalization-fraud proceeding.¹⁸ When an individual is convicted of “procurement of citizenship or naturalization unlawfully,” under 18 U.S.C. § 1425, the court is required to revoke the defendant’s naturalization.¹⁹ The second mechanism, and the focus of this Article, is through a civil proceeding under 8 U.S.C. § 1451(a). This section allows a U.S. attorney to file suit seeking to revoke citizenship on two potential grounds: first, that the

¹⁵ See *infra* Part III.B. and III.C.

¹⁶ Patricia Mazzei, *Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You’re Not*, N.Y. TIMES (July 23, 2018) (“Since President Trump took office, the number of denaturalization cases has been growing, part of a campaign of aggressive immigration enforcement that now promises to include even the most protected class of legal immigrants: naturalized citizens.”).

¹⁷ See Hanna E. Borsilli, Comment, *But It’s Just a Little White Lie! An Analysis of the Materiality Requirement of 18 U.S.C. § 1425*, 122 DICKINSON L. REV. 675, 681-88 (2018) (providing a detailed explanation of the grounds for denaturalization).

¹⁸ Blanco *et al.*, *supra* note 11, at 6.

¹⁹ 8 U.S.C. § 1451(e) (“When a person shall be convicted under section 1425 of title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled.”). Conviction also carries a potential ten- to twenty-five-year term of incarceration. 18 U.S.C. § 1425.

naturalization was “illegally procured,” (that is, the individual did not meet the statutory requirements for citizenship, including the requirement for “good moral character”) or second, that the naturalization was “procured by concealment of a material fact or by willful misrepresentation.” Because denaturalization proceedings are considered equitable in nature, they traditionally carry no right to a jury.²⁰

When the court grants denaturalization, the individual who loses citizenship reverts back to the immigration status held immediately prior to naturalization—often the status of lawful permanent resident.²¹ Further proceedings may change that status, however, potentially leading to a removal order requiring deportation.²² Denaturalization relates back to the original grant of citizenship; the Immigration and Nationality Act provides that denaturalization “shall be effective as of the original date” of naturalization.²³

This “relation back” policy can have serious consequences. When a civil denaturalization case finds that the defendant has gained citizenship “by concealment of a material fact or by willful misrepresentation,” then the spouse and child of the defendant may lose their citizenship as well. Under the statute, the individuals who gained citizenship “by virtue of such naturalization of such parent or spouse” are deemed to lose citizenship, even if they reside in the United States.²⁴ Of course, a child who otherwise qualified for citizenship (for example, one born in the United States) would not have obtained citizenship through the parent’s naturalization, and would therefore not be at risk for loss of citizenship.²⁵ But a child born abroad would lose citizenship in such a case. One court has even held that such a child is not entitled to the appointment of a guardian ad litem in the parent’s denaturalization case, as the child’s citizenship rights “must rise or

²⁰ Blanco *et al.*, *supra* note 11, at 6.

²¹ 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 96.13 (Matthew Bender, Rev. Ed. 2018) (“The immediate effect of denaturalization, of course, is to divest the naturalized persons of their status as U.S. citizens, to restore them to the former status of alienage, and to make them amenable to the consequences of such alien status.”).

²² 5 *id.* at § 64.03 (discussing removal procedure).

²³ INA § 340(a), 8 U.S.C. § 1451(a).

²⁴ INA § 340(d), 8 U.S.C. § 1451(d).

²⁵ Even birthright citizenship, however, is currently under challenge. See Ediberto Román & Ernesto Sagás, *Birthright Citizenship Under Attack: How Dominican Nationality Laws May Be the Future of U.S. Exclusion*, 66 AM. U. L. REV. 1383, 1385 (2017) (“Trump promised that, if elected, his administration would ‘end birthright citizenship.’”) (citing Donald Trump, *Immigration Reform that Will Make America Great Again*, <https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf> (last visited Aug. 12, 2018)).

fall solely on the basis of the rights of the . . . parent from whom they stem, and there are no rights to be protected independently by guardian ad litem.”²⁶

A. Recent Trends Shaping Current Denaturalization Policy

The current growth of denaturalization as a policy tool results from the intersection of several recent trends. The first is the shrinking cost of computing power: it is now much easier to digitize records and to use software tools to analyze hundreds of thousands of records at once.²⁷ And the impetus to do so took root in the Obama administration, which asserted a national security interest in examining potential cases of immigration fraud that could potentially be tied to terrorist threats. Overall, the Obama years saw a significant increase in immigration enforcement.²⁸

After President Trump took office in January 2017, the government adopted a so-called zero-tolerance immigration policy.²⁹ Of course, there are simply too many immigrants and potential immigrants to enforce all of the immigration laws all of the time, so what the zero-tolerance policy meant in practice was that sanctions would be applied in an unpredictable and arbitrary manner—a potential violation of due process.³⁰ Unlike in the past, there would be

²⁶ U.S. ex rel. Harrington v. Schlotfeldt, 136 F.2d 935, 939–40 (7th Cir. 1943).

²⁷ Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1758 (2015) (explaining that “transaction costs for the collection and analysis of data have rapidly decreased. Therefore, economic restraints on investigatory and administrative capacity to impose consequences are rapidly decreasing as well”).

²⁸ Elliott Young, *Felons and Families*, UNC PRESS BLOG (Apr. 3, 2017) at <https://uncpressblog.com/2017/04/03/elliott-young-felons-and-families/> (“Trump’s immigration policies, as drastic and horrible as they are, merely accelerate the criminalization of immigrants that was in full swing under Obama.”).

²⁹ See Lorelei Laird, *Border Lines: ABA Works to Meet Immigrants’ Increased Need for Legal Assistance and Oppose Family Separations*, ABA J., Aug. 2018, at 64 (explaining how the adoption of the zero-tolerance policy has resulted in a greater need for legal services); Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 315–16 (2018) (“Although the likelihood of an ICE encounter may still be small, immigration enforcement since the election of President Trump is up. ICE is following the new enforcement priorities and making collateral arrests along the way.”).

³⁰ See *infra* Part I.A.ii; Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 584 (1972) (“(T)he protection of the individual against arbitrary action . . . (is) the very essence of due process.”) (internal quotation marks omitted); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 292 (2012) (“An arbitrary act has either no reasons to explain it or only reasons that would with equal plausibility justify the opposite act.”).

no tolerance for small infractions. Activities that might have been tolerated under a doctrine of prosecutorial discretion could now be subject to immediate sanction—but no one could predict when and on whom those sanctions would fall.

i. Newly Digitized Data and Operation Janus

Janus was the two-faced Roman god of “beginnings and transitions,” looking simultaneously into the past and the future.³¹ The Department of Homeland Security’s “Operation Janus” similarly looks back over the files of naturalized citizens, examining the historical record to see whether evidence overlooked in the past could support filing a future denaturalization proceeding.³² The effort focuses on individuals from “special interest countries,” related to national-security priorities, largely (though not entirely) centered on the Middle East.³³

The program began under the Obama administration in 2009, when the U.S. Customs and Border Protection identified 206 individuals “who had received final deportation orders and subsequently used a different biographic identity, such as a name and date of birth, to obtain an immigration benefit (e.g., legal permanent resident status or citizenship).”³⁴ Further inquiry revealed another 1,029 cases of individuals with previously overlooked deportation orders who had nonetheless been granted citizenship, 858 of whom did not have digital fingerprints on file.³⁵ As a result, the United States Citizenship and Immigration

³¹ John Patrick Clayton, Note, *The Two Faces of Janus: The Jurisprudential Past and New Beginning of Rule 10b-5*, 47 U. MICH. J.L. REFORM 853, 854 (2014).

³² See Hoppock, *Second Look*, *supra* note 4 (analyzing government reports regarding Operation Janus and Operation Second Look).

³³ Office of Inspector General, Department of Homeland Security, *Potentially Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records* 1, n. 2 (Sept. 26, 2016), <https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2016/OIG-16-130-Sep16.pdf> (“Special interest countries are generally defined as countries that are of concern to the national security of the United States, based on several U.S. Government reports.”); *see also* Cato, *Coming to America: The Weaponization of Immigration*, 46 WASHBURN L.J. 309, 326 (2007) (describing “thirty-five nations designated by the United States Department of Homeland Security as ‘special interest’ countries . . . so labeled because American intelligence identifies them as likely exporters of terrorism,” including “Iran, Jordan, Lebanon, Syria, Egypt, Saudi Arabia, Kuwait, Pakistan, Cuba, Brazil, Ecuador, China, Russia, Yemen, Albania, Yugoslavia and Afghanistan,” as well as others).

³⁴ *Id.* at 1.

³⁵ *Id.* These numbers represent a very small fraction of the foreign-born population in the United States because well over a million individuals per year legally immigrate to the United States. *See* Jie Zong et al., *FREQUENTLY REQUESTED STATISTICS ON IMMIGRANTS AND IMMIGRATION IN THE*

Services began a concerted effort to digitize and upload decades-old fingerprint records and to match those records with immigration files.³⁶

In 2016, the Office of the Inspector General reported that ICE had identified 315,000 files with missing fingerprint records but had “not yet reviewed about 148,000 aliens’ files to try to retrieve and digitize the old fingerprint cards.”³⁷ That process is now ongoing, and the agency has sought funds to expand it even more. ICE’s 2019 budget request seeks funds to review another 700,000 files—all with the purpose of seeking potential deportation or denaturalization.³⁸

As of August 2018, the Department of Justice had announced the filing of seven actions arising from Operation Janus.³⁹ Three of those are criminal actions for fraud in the immigration process. Two of those cases ended with a plea agreement that includes denaturalization, and one ended in a criminal conviction.⁴⁰ An additional four cases were filed as civil actions seeking denaturalization. Of the civil actions filed, only the first has been concluded; it resulted in a summary judgment of denaturalization.⁴¹ Immigration law experts expect a number of additional cases to be filed in the near future.⁴²

ii. Zero Tolerance

In one of his major campaign speeches in September 2016, then-candidate Donald Trump announced that if he is elected “all immigration laws will be enforced . . . [and] no one will be immune or exempt from enforcement Anyone who has entered the United States illegally is subject to deportation – that is what it means to have laws and to have a country.” Because of the significant number

UNITED STATES, MIGRATION POLICY INSTITUTE (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

³⁶ *Id.*

³⁷ *Id.* at 2-4.

³⁸ DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW, FISCAL YEAR 2019, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>; *see also* Hoppock, *Second Look*, *supra* note 4.

³⁹ *See* Hoppock, *Second Look*, *supra* note 4.

⁴⁰ *Id.*

⁴¹ *Id.*; *see infra* Part I.B.

⁴² Matthew Hoppock, *Three Operation Janus Updates in the Pending Cases in Federal Court* (May 15, 2018), <https://www.hoppocklawfirm.com/three-operation-janus-updates-in-the-pending-cases-in-federal-court/> (“We anticipate the DOJ will be filing more of these cases shortly, especially if they can get these cases granted without having to fight very hard.”).

of individuals who have entered the United States illegally or have a more minor problem in their record, it is essentially impossible to pursue everyone. The result is arbitrary and unpredictable enforcement. In some cases, individuals on the path to regularization are trapped at the exact moment that they believed their legal situation was about to be resolved:

As the Trump administration arrests thousands of immigrants with no criminal history and reshapes the prospects of even legal immigrants — an overdue corrective, officials say, to the lenient policies of the past — many who have lived without papers for years are urgently seeking legal status by way of a parent, adult child or spouse who is already a citizen or permanent resident. In a growing number of cases, however, immigrants with old deportation orders that were never enforced are getting the go-ahead after an interview by United States Citizenship and Immigration Services, the agency that handles residency and citizenship, only to be arrested by ICE.⁴³

Internal emails uncovered by the ACLU have revealed coordination between USCIS and ICE to nab undocumented immigrant spouses of U.S. citizens when the spouses were coming to interview to obtain legal status.⁴⁴ This included the spreading out of interviews to increase enforcement and the delaying of an interview to give ICE the chance to show up and arrest the individual.⁴⁵

Stories are also trickling out of individuals being deported after serving in the U.S. military when this had become a shield against such actions.⁴⁶ Military spouses are suffering similar fates, and families are ripped apart even when there was no criminal behavior or anything else that raised obvious problems.⁴⁷

⁴³ Vivian Yee, *A Marriage Used to Prevent Deportation. Not Anymore.*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html>.

⁴⁴ Sonia Moghe & David Shortell, *ACLU: Officials Set up 'Trap' to Arrest Immigrants at Legal Status Interviews*, CNN (Aug. 14, 2018), <https://www.cnn.com/2018/08/14/politics/ice-immigrants-trap-lawsuit-aclu/index.html>.

⁴⁵ See *id.*

⁴⁶ See, e.g., Kristine Phillips, *The Story Behind this Powerful Photo of Deported Military Veterans Saluting the U.S. Flag*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/11/16/the-story-behind-this-powerful-photo-of-deported-military-veterans-saluting-the-american-flag/?utm_term=.463ad5f83584.

⁴⁷ See, e.g., Associated Press, *'It's an Absolute Disgrace': Tears and Anger as Wife of US Marine Deported to Mexico*, GUARDIAN (Aug. 3, 2018), <https://www.theguardian.com/world/2018/aug/03/us-marine-wife-alejandra-juarez-deported-mexico>.

One of the most disconcerting trends involves deporting or threatening with deportation individuals who acted legally and/or in reliance on previous actions by the government. The executive is currently locked in a battle with the courts over the fate of the Deferred Action for Childhood Arrivals (DACA) program, which seeks to protect from deportation young individuals who came to the United States as children, and a federal district court judge ruled most recently that the administration is obligated to restore the program.⁴⁸ At the time of this writing, the administration is considering implementing policy changes proposed by White House advisor Stephen Miller that raise grave concerns in that respect as well. Miller has proposed changing the definition of “public charge” to make legal immigrants’ past use of a whole host of government benefits a barrier to permanent residency or even citizenship.⁴⁹ Aside from the question of the general wisdom of this policy, the due process aspects of its retroactivity are disconcerting. People who followed the law, in some cases pressured to obtain (subsidized) insurance by the individual mandate of the Affordable Care Act lest they have to pay a hefty penalty, could now find themselves at risk of not being able to improve or even maintain their status; indeed, some suggest that green card holders could even lose their existing status under this plan.⁵⁰ What began as rhetoric about fighting illegal immigration and crime has rapidly morphed into attacks on legal behaviors made suspect—after the fact—only because they belonged to foreign-born nationals.

B. The Two Trends Converge in Current Litigation

Both of these trends—looking back at old cases with the help of newly digitized data and increasing enforcement without regard to mitigating factors—have led to a perfect storm in denaturalization cases, creating a reasonable fear that even long-ago mistakes can unravel current citizenship rights. Operation

⁴⁸ NAACP v. Trump, Civil Action No. 17-1907 (D.D.C. Aug. 3, 2018), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1907-27. See also Vanessa Romo, *Judge Orders Trump Administration to Fully Restore DACA*, NPR, <https://www.npr.org/2018/08/03/635546997/judge-orders-trump-administration-to-fully-restore-daca> (Aug. 3, 2018).

⁴⁹ Tal Kopan, *Sources: Stephen Miller Pushing Policy to Make It Harder for Immigrants Who Received Benefits to Earn Citizenship*, CNN (Aug. 7, 2018), <https://www.cnn.com/2018/08/07/politics/stephen-miller-immigrants-penalize-benefits/index.html>.

⁵⁰ See Michael D. Shear & Ron Nixon, *Plan to Punish Immigrants for Using Welfare Could Boost G.O.P. Candidates*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/politics/legal-immigrants-welfare-republicans-trump.html>.

Janus has led to the filing of several civil denaturalization cases, including the first case to reach judgment: that of Baljinder Singh, who sought asylum in the United States as a teenager in the early 1990s, and obtained citizenship in 2007. Singh has no reported criminal history. Similarly, the zero-tolerance approach resulted in the government seeking to denaturalize Norma Borgoño, a 63-year-old grandmother who was, in the government's words, a "minimal participant" in her former boss's fraud but who helped the FBI build the case against him. Without the zero-tolerance policy, the government likely would have exercised prosecutorial discretion not to seek her denaturalization. Under the current policy in place however, the government filed civil denaturalization actions against both Singh and Borgoño.

i. Baljinder Singh: Newly Digitized Data

Baljinder Singh had immigrated to the United States as a fifteen- or sixteen-year-old in 1991.⁵¹ In February of 1992, he filed an application for political asylum. Nearly five years later, while his asylum application was still pending, Singh married a U.S. citizen and applied for an adjustment of status. In 1998, he was granted lawful permanent resident status. In 2006, Singh took the Oath of Allegiance to the United States and became a naturalized citizen.

Twelve years later, Singh's file was reviewed as part of Operation Janus. The government alleged that Singh had originally entered the United States under the name Davinder Singh and had filed an earlier proceeding under that name. He had allegedly arrived in the U.S. on a flight from Hong Kong in September 1991, as a teenager traveling without a passport or any other identification papers.⁵² A Punjabi interpreter wrote his name down as "Davinder Singh."⁵³ He was fingerprinted and detained for nearly two weeks, then released on bond to stay with a friend in October of that year.⁵⁴ Three weeks after his release, notice of an upcoming immigration hearing was mailed to his friend's house. When he failed to show up for the hearing in January of 1992, the court ordered him deported *in absentia*.⁵⁵

At nearly the same time, however, a parallel case was going forward in another courtroom: An asylum action for "Baljinder Singh" was filed on February

⁵¹ Complaint, U.S. v. Singh, United States District Court, D. New Jersey, Case 2:17-cv-07214, Sept. 19, 2017.

⁵² United States v. Singh, No. CV 17-7214 (SRC), 2018 WL 305325, at *1 (D.N.J. Jan. 5, 2018)

⁵³ *Id.*

⁵⁴ Complaint, U.S. v. Singh, United States District Court, D. New Jersey, Case 2:17-cv-07214, Sept. 19, 2017 at 4.

⁵⁵ United States v. Singh, No. CV 17-7214 (SRC), 2018 WL 305325, at *1 (D.N.J. Jan. 5, 2018)

6, 1992, less than a month after “Davinder” had failed to show up for the asylum hearing in the other case.⁵⁶ That case was never dismissed on the merits; instead, it remained pending for more than four years until Baljinder Singh married a U.S. citizen and obtained adjustment of his immigration status to lawful permanent resident, and later obtained naturalization.⁵⁷

It was not until Operation Janus was able to digitize the old fingerprint cards and use electronic resources to analyze them that the two cases were ever connected. The Justice Department compared “a January 24, 1992 fingerprint card bearing the name Baljinder Singh to a September 25, 1991 fingerprint card bearing the name Davinder Singh.”⁵⁸ The investigation concluded that “[b]ased on a comparative analysis of the friction ridge details of each fingerprint . . . the fingerprints match and belong to the same individual.”

In September 2017, the Acting U.S. Attorney for the District of New Jersey filed a civil denaturalization complaint against Singh. In its complaint, the government alleged that Singh had procured naturalization by fraud or willful misrepresentation.⁵⁹

Singh did not file an answer or appear in the lawsuit, and there is no record of an attorney representing him in the case. As a result, when the government moved for summary judgment, it was unopposed. The district court consequently held that “by failing to respond to the complaint, Defendant has defaulted and thus is ‘deemed to have admitted the factual allegations of the Complaint by virtue of [his] default.’”⁶⁰ Taking the government’s allegations as true, and noting that there had been no evidence “to impeach the credibility of this scientific fingerprint analysis,” the court concluded that Singh had “procured his naturalization as a result of these misrepresentations and concealments.”⁶¹ The court granted summary judgment in favor of the government, ruling that Singh would be denaturalized.

Of course, we do not know why Singh did not answer the lawsuit. The agent who served process did not serve him personally—instead, the summons and complaint were left with someone else—a person of “suitable age and

⁵⁶ Complaint, U.S. v. Singh, United States District Court, D. New Jersey, Case 2:17-cv-07214, Sept. 19, 2017 at 2-3

⁵⁷ *Id.* at 3.

⁵⁸ *Id.*

⁵⁹ Complaint, U.S. v. Singh, United States District Court, D. New Jersey, Case 2:17-cv-07214, Sept. 19, 2017 at 4.

⁶⁰ United States v. Singh, No. CV 17-7214 (SRC), 2018 WL 305325, at *1 (D.N.J. Jan. 5, 2018) at *1, n.2 (quoting Doe v. Simone, 2013 WL 3772532, at *2 (D.N.J. July 17, 2013).

⁶¹ *Id.* at *6.

discretion” who lived at his last known address.⁶² As a result, it is possible that he did not learn of the lawsuit in time to defend it. And it is possible that even now he does not know that he has lost his citizenship and therefore might have to wait until he tries to travel on a passport or vote in a federal election to find out that he is no longer a citizen of the United States.

We also do not know why (assuming the government properly matched the fingerprint cards) Singh failed to show up to the earlier asylum hearing or why the case might have been filed under a different name. The government, of course, claims that this was intentional fraud—a person using two different names to gain an unfair advantage. But this is not a case where someone lost an asylum case on the merits before re-filing under a new name. There appears to be little or no benefit to Singh from filing two different asylum proceedings under two different names.

It is possible that the Punjabi translator simply made a mistake in originally recording his name as “Davinder” rather than “Baljinder.” Competent Punjabi translators can be difficult to find; a lawyer for Gurbinder Singh, a later asylum seeker, reported that “the only translator he had been able to find in the general area was an Albuquerque-based cab driver who ha[d] only conversational Punjabi skills and couldn’t communicate at the level . . . needed to fill out his clients’ asylum claims in detail.”⁶³ Perhaps a poorly prepared translator misunderstood Singh’s first name, and when Singh or his newly appointed lawyer contacted the court later, they were told that there was no filing under his name. If so, that could provide an innocuous explanation for why he then sought to file a second asylum proceeding less than a month after failing to show up for the first.

But without the defendant present (either in person or through an attorney), we are left to guess. Apparently nothing in the second proceeding led the government to be concerned about Singh’s background or moral character, and nothing in the recent denaturalization petition suggests any later history of

⁶² See Process Receipt and Return (showing that service was made upon one Pritam Singh); Fed. R. Civ. P. 4 (allowing service of process on a “person of suitable age and discretion” who shares a residence with the defendant). The shared last name of “Singh” does not necessarily suggest a familial relation. All Sikh males take the last name of Singh. See *Singh and Kaur, Immigration Challenges of the Last Name*, at <http://www.garamchai.com/articleSingh.htm> (noting that Sikh men began taking the common last name of “Singh” to avoid caste signifiers, and explaining that this tradition has caused difficulties in immigration). In addition, the city of Carteret, where Baljinder Singh was last known to live, has the largest Sikh community in the state of New Jersey. Kevin Coyne, *Turbans Make Targets, Some Sikhs Find*, N.Y. TIMES (June 15, 2008) (stating that “New Jersey is home to more than 25,000 Sikhs,” and Carteret is “home to the largest concentration of Sikhs in the state”).

⁶³ Sonia Smith, *The Long Road to Asylum*, TEX. MONTHLY (Aug. 25, 2014), at <https://www.texasmonthly.com/politics/the-long-road-to-asylum/>.

criminal activity. But twenty years after he was granted lawful permanent resident status, and more than ten years after becoming a United States citizen, Baljinder Singh was stripped of that citizenship—without the aid of an attorney and without the effective chance to contest the allegations against him.

ii. **Norma Borgoño: Zero Tolerance and Collateral Consequences**

Norma Borgoño, a 63-year-old grandmother who suffers from a rare kidney disease, is one of the individuals targeted for denaturalization based on criminal activity.⁶⁴ Borgoño legally immigrated to the United States in 1989 and obtained U.S. citizenship in 2007.⁶⁵ Between 2003 and 2009, Borgoño worked as an office manager for Guillermo Oscar Mondino. During this time, Mondino was orchestrating a fraudulent plan to obtain loan guarantees from The Export-Import Bank of the United States, the government’s official export credit agency. When the FBI investigated the fraud, Borgoño provided assistance. Mondino pleaded guilty to fraud and money laundering, was sentenced to nearly four years in prison, and was ordered to pay more than \$13 million in restitution.⁶⁶

Borgoño, as office manager, prepared paperwork that her boss used in the fraudulent transactions. When the FBI investigated the case, she provided assistance that helped to incriminate Mondino.⁶⁷ Because she allegedly knew that her boss’s actions were fraudulent at the time that she helped to prepare the paperwork for the deals, she was charged with conspiracy—though the Justice Department acknowledged that she was a “minimal participant.”⁶⁸ Rather than stand trial, Borgoño accepted a plea deal that gave her five years of probation and

⁶⁴ *Justice Department Seeks to Revoke Citizenship of Convicted Felons Who Conspired to Defraud U.S. Export-Import Bank of More Than \$24 Million*, DEPT. OF JUSTICE (May 8, 2018), at <https://www.justice.gov/opa/pr/justice-department-seeks-revoke-citizenship-convicted-felons-who-conspired-defraud-us-export>

⁶⁵ Affidavit of David Jansen, *United States v. Norma Borgoño*, Nov. 2, 2011 at <https://www.justice.gov/opa/press-release/file/1060901/download>.

⁶⁶ Statement of the Offense, *United States v. Mondino*, at 4 (“Between April 2003 and October 1, 2011, the Ex-Im Bank paid more than \$15.9 million to lending banks or their assignees based on claims on guaranteed loans that had gone into default. As of April 1, 2010, more than \$12.5 million of the amounts paid on claims for defaulted loans remained unrecovered.”), <https://www.justice.gov/opa/press-release/file/1060916/download>.

⁶⁷ deGooyer, *supra* note 8 (“She immigrated legally, suffers from a rare kidney disease, and even cooperated with the FBI when they investigated the crime. Still, after living and working for decades in the United States, she is facing deportation.”).

⁶⁸ Plea Offer, *United States v. Norma Borgono*, Nov. 2, 2011 at <https://www.justice.gov/opa/press-release/file/1060901/download>.

required her to pay \$5,000 in restitution.⁶⁹ Borgoño did not share in the millions of dollars fraudulently paid out.⁷⁰ At most, less than \$2000 was paid to Borgoño's account.⁷¹ While on probation, she worked a second job and paid the ordered restitution in full.⁷²

The government's denaturalization petition seeks to revoke Borgoño's citizenship on the grounds that Borgoño lacked the requisite good moral character to qualify for naturalization. It alleges that she lied in her citizenship application by falsely answering "no" on the naturalization application when it asked whether she had "knowingly committed any crime for which she had not been arrested."⁷³ It further alleges that Borgoño's conspiracy conviction was a "fraud related offense" that "statutorily precludes" her from establishing good moral character under 8 U.S.C. § 1101(f)(3), which provides that an applicant convicted of a crime of moral turpitude cannot establish good moral character.

Borgoño's case is still pending, and the government may well lose on the merits. Even though fraud claims are typically considered crimes of moral turpitude, Borgoño's case is not a typical one and it is not clear that the facts in Borgoño's case meet the moral-turpitude standard. Borgoño neither orchestrated the scheme nor personally benefitted from it. She provided office support to a boss engaged in financial crime, and her only personal benefit was being allowed to keep her job—a job that may well have provided life-saving health-insurance benefits that allowed her to seek treatment for her kidney disorder.⁷⁴

Furthermore, there is a not-insignificant chance that Borgoño may have been factually innocent of the crime she pleaded guilty to.⁷⁵ Because she pleaded

⁶⁹ *Id.*

⁷⁰ Adiel Kaplan, *Miami Grandma Targeted as U.S. Takes Aim at Naturalized Immigrants with Prior Offenses*, MIAMI HERALD (July 9, 2018), at <https://www.miamiherald.com/news/local/immigration/article214173489.html>.

⁷¹ Information, *United States v. Norma Borgono*, Nov. 2, 2011 at <https://www.justice.gov/opa/press-release/file/1060901/download>.

⁷² Kaplan, *supra* note 70.

⁷³ Compl., ¶81, *U.S. v. Borgono*, May 5, 2018, at <https://www.justice.gov/opa/press-release/file/1060906/download>.

⁷⁴ Kaplan, *supra* note 70 (noting that Borgoño's close family members in Peru had died of the same kidney disease she is now being treated for).

⁷⁵ A new report notes that this is not an infrequent occurrence. Nat'l Assoc. Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 10, 2018), <https://www.nacdl.org/trialpenaltyreport/> ("There is ample evidence that federal criminal defendants are being coerced to plead guilty because the penalty for exercising their constitutional rights is simply too high a risk.").

guilty, the government did not need to prove that Borgoño understood that the paperwork she prepared for her boss was being used in a fraudulent transaction or that she had the intent to assist in his fraud. Perhaps she did have the requisite *mens rea*. But her sentence of probation and minimal restitution was not onerous, and Borgoño may well have judged that it was not worth the expense and risk of going to trial.⁷⁶ Even if factually innocent, she may have worried about the possibility of a wrongful conviction. And she may also have not been sure of either her legal guilt or innocence: for example, she may have struggled to remember exactly what she knew at the time that she completed her boss's paperwork—did she know her boss was committing fraud, or did she merely suspect it? Certainly, once the FBI approached her, she assisted in the investigation. But she likely would not have been able to evaluate her own potential liability, and it is not uncommon that a defendant “later may well question her own judgment and the reasonableness of her belief.”⁷⁷

Of course, that calculation only makes sense if Borgoño did not understand the potential collateral consequences of her plea—that pleading guilty could cause her citizenship to be stripped and create a risk that she could be deported to a country where she no longer has any family or personal connections. Indeed, she says now that she had no idea that denaturalization could be a potential consequence. If so, she may be able to challenge the underlying conviction, and with it, the government's denaturalization petition. The Supreme Court held in *Padilla v. Kentucky* that attorneys provide ineffective assistance of counsel if they fail to inform clients that their plea “carries a risk of deportation.”⁷⁸ Denaturalization is a much more severe risk than deportation; under the logic of *Padilla*, a defendant who pleads guilty without being told of the risk of losing citizenship should be able to challenge that conviction.

⁷⁶ Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 960–61 (2012) (“Despite stubborn perceptions to the contrary, innocent defendants plead guilty. Eight percent of the wrongfully convicted defendants exonerated by DNA initially entered guilty pleas, and the strong incentives that push some innocent defendants to plead guilty remain, suggesting that this trend may continue.”); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 951 (2008) (“Innocent defendants often have less information about the case against them than guilty defendants and therefore cannot accurately evaluate the strength of the case against them.”).

⁷⁷ Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 971 (1989) (noting that such problems can arise especially “under ambiguous circumstances,” where liability depends on the reasonableness of the defendant's actions).

⁷⁸ *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

II. The Rise and Fall of Denaturalization Policy

How do the Singh and Borgoño cases fit within the United States' denaturalization policy? In short, they seem to reflect a throwback policy that does not fit into present-day denaturalization policy at all—and that is one of the reasons that the cases have caused such a public outcry.⁷⁹ Denaturalization was relatively common in the first half of the twentieth century, with over 22,000 Americans losing their citizenship between 1907 and 1967.⁸⁰ But it rapidly fell out of favor in the second half of the twentieth century.⁸¹ Between 1968 and 2013, fewer than 150 Americans were denaturalized.⁸² As a result, one scholar concluded in 2013 that “denaturalization has largely become a thing of the past,” primarily reserved for people who “camouflaged crimes against humanity prior to their immigration.”⁸³

The decline in denaturalization coincided with a series of Supreme Court cases protective of citizenship rights.⁸⁴ Those cases made it more difficult for the government to strip individuals of their citizenship. But they alone were not the driving force in denaturalization's wane in the mid-to-late twentieth century; instead, the decline of the Red Scare and an increasing emphasis on civil rights played an equal or greater role.

A. The Origin of Denaturalization Authority

Denaturalization is never mentioned in the Constitution. Naturalization, on the other hand, is a power explicitly constitutionally given to Congress.⁸⁵ Congress accordingly developed criteria for when and how immigrants to the U.S.

⁷⁹ Mazzei, *supra* note 16 (“The renewed focus on denaturalization, and a recent uptick in the number of cases filed by the Justice Department, have deeply unsettled many immigrants who had long believed that a United States passport warded off a lifetime of anxiety over possible deportation.”).

⁸⁰ PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 179 (2013).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 180.

⁸⁴ See *infra* Part III.

⁸⁵ U.S. CONST. art. I, § 8, cl. 4. (“The Congress shall have Power . . . ; To establish an uniform Rule of Naturalization”).

could gain citizenship.⁸⁶ Originally, this process was very simple and geographically diffused. For more than a century, Congress allowed “any court of record”—from a district court, territorial court, or state court—to grant naturalization.⁸⁷ Administrative power over naturalization did not become centralized until 1990, when Congress changed the procedure to create an administrative process for naturalization, supervised by the Attorney General.⁸⁸ Even after the executive branch took over primary responsibility for naturalization, the judiciary remained involved; even now, courts still administer the oath of citizenship.⁸⁹

Even as naturalization procedures became more systematic, denaturalization got scant attention in American law or policy development. After all, in the earliest years of the United States, there was a strong public policy toward open immigration and simple procedures to obtain citizenship; “[i]t was a big country; they needed folks to settle it.”⁹⁰

But even in these early years, naturalization procedures were sometimes overlooked for political expedience. There was essentially a power struggle between state and federal courts. Congress authorized state courts to naturalize new citizens.⁹¹ But while Congress adopted naturalization procedures and requirements (including, for example, a five-year waiting period),⁹² state courts

⁸⁶ For a description of the history of congressional legislation in this area, see Aram A. Gavoort & Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 WM. & MARY BILL RTS. J. 637, 652 (2015).

⁸⁷ U.S. IMMIGRATION AND NATURALIZATION SERVICE - POPULATING A NATION: A HISTORY OF IMMIGRATION AND NATURALIZATION, <http://archive.li/mRgfx> (noting that courts used their own processes and procedures for naturalization from 1802 until Congress passed the 1906 Act); *Gorbach v. Reno*, 219 F.3d 1087, 1089 (9th Cir. 2000) (explaining that courts continued to exercise the naturalization power under Congress’s procedures until 1990).

⁸⁸ Gavoort & Miktus, *supra* note 86, at 652.

⁸⁹ *Id.*

⁹⁰ POPULATING A NATION, *supra* note 87.

⁹¹ *Bindczyck v. Finucane*, 342 U.S. 76, 85 (1951) (“By giving State courts jurisdiction in naturalization cases, Congress empowered some thousand State court judges to adjudicate citizenship.”).

⁹² Gavoort & Miktus, *supra* note 86, at 647 (explaining that prior to 1906, an applicant for naturalization had to demonstrate five years of residence in the United States as well as good moral character and attachment to the Constitution; after 1906, there was an additional 90-day waiting period after the individual had filed an application before naturalization could be granted).

did not always follow them.⁹³ Naturalizations also sometimes occurred *en masse* before local elections, in an effort to create new voters.⁹⁴ As a result, it was not until 1906 that Congress even adopted a statutory mechanism for denaturalization.⁹⁵ In the Naturalization Act of 1906, Congress authorized U.S. district attorneys to bring suit “upon affidavit showing good cause therefore, to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured.”⁹⁶

In addition to providing a statutory procedure for citizenship revocation, the Act also established new requirements for citizenship that reflected changing beliefs about what it meant to be American. The Act made anarchists and polygamists ineligible to become American citizens.⁹⁷ For the first time, citizenship eligibility depended on evaluation of personal belief—not just on the length of residence or willingness to take an oath of citizenship.⁹⁸

B. Early Growth of Denaturalization

The Naturalization Act of 1906 explicitly tied citizenship to political belief for the first time.⁹⁹ But the connection between naturalization policy and national identity soon grew stronger, as the United States began to grapple with what it meant to be an American—and with how that American identity should align with immigration, naturalization, and denaturalization policy.¹⁰⁰

Part of that identity had to do with race and gender. Citizenship-stripping provisions, in particular, reflected both gender and racial inequities. Married

⁹³ WEIL, *supra* note 80, at 3 (“The state judiciary, however, did not always respect citizenship requirements set by federal law.”).

⁹⁴ *Id.* at 15.

⁹⁵ Gavoor & Miktus, *supra* note 86, at 649. Because naturalization in this era happened through court proceedings, often in state court, some denaturalization actions took place through the ordinary process by which judgments could be re-opened or vacated. See Bindczyck, 342 U.S. at 81–82 (explaining that prior to the 1906 act, there were “widely diverse naturalization procedures,” for “haphazard denaturalization,” including a number of cases in which “the then circuit courts had vacated naturalization orders at the suit of the Attorney General”).

⁹⁶ Immigration and Naturalization Act of 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596.

⁹⁷ *Id.*

⁹⁸ Gavoor & Miktus, *supra* note 86, at 650.

⁹⁹ *Id.*

¹⁰⁰ WEIL, *supra* note 80, at 56 (“A naturalized person who was Asian, spoke out against the war, or was a socialist, a communist, or a fascist risked the loss of his American citizenship.”).

women had no independent right to citizenship.¹⁰¹ A federal statute adopted in 1907 provided that a woman would automatically lose her U.S. citizenship upon marriage to a foreign man, and could regain citizenship only “at the termination of the marital relationship.”¹⁰² Likewise, the federal naturalization statute allowed only “free white persons” and persons of African descent to become naturalized—Asians were ineligible for naturalization (though still constitutionally entitled to citizenship as “natural born citizens” if born in the United States).¹⁰³

When these requirements were brought into denaturalization proceedings, both women and racial minorities risked losing their citizenship. A number of individuals from India had gained citizenship in the United States, for example, only to find it summarily stripped under the “illegal procurement” prong when the United States Supreme Court held that they were not, in fact, white.¹⁰⁴ The Court stated that even though such individuals were “of high-caste Hindu stock . . . classified by certain scientific authorities as of the Caucasian or Aryan race,” they would not be understood as “white,” to the “common man.”¹⁰⁵ As a result of these holdings, not only did Indian-born men lose their citizenship—but American-born women married to them automatically lost theirs as well, even though it rendered them stateless.¹⁰⁶ Mary Das, “a member of an old American

¹⁰¹ See *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915) (“We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it But . . . [t]he marriage of an American woman with a foreigner has consequences . . . as long as the relation lasts, it is made tantamount to expatriation.”). This requirement was partially repealed by Congress in 1922 with the passage of the Cable Act, and fully repealed in 1931. Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 357 (2007).

¹⁰² *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915) (“We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it But . . . [t]he marriage of an American woman with a foreigner has consequences . . . as long as the relation lasts, it is made tantamount to expatriation.”). This requirement was partially repealed by Congress in 1922 with the passage of the Cable Act, and fully repealed in 1931. Chacón, *supra* note 101, at 357.

¹⁰³ *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* This standard was subject to criticism from its inception. See Note, *The Nationality Act of 1940*, 54 HARV. L. REV. 860, 865 (1941) (“This substitution of common for scientific knowledge, while in keeping with legislative intent, did not establish a very workable standard. The common man, like the Court of Appeals for the Second Circuit, is not quite sure as to a Parsee’s racial status.”).

¹⁰⁶ Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 435 (2005).

family from the South, of Revolutionary ancestry, a woman of wealth and prominence,” who had married a naturalized citizen from India described suffering “the humiliation and the thought of not being wanted as an American citizen.”¹⁰⁷

C. World Wars and the Fear of Communism

Political denaturalization grew stronger during the first half of the nineteenth century, as the United States first fought two world wars and subsequently looked inward to fight against a perceived threat of communist sympathy. In some cases, the government bureaucracy was able to tie pre-existing naturalization requirements to more explicit political goals. The discretion inherent in deciding to bring denaturalization proceedings, combined with the likelihood of administrative error somewhere in the naturalization process, made it relatively easy for the government to target specific individuals.¹⁰⁸

Thus, for example, Emma Goldman—a radical activist, anarchist, and naturalized citizen—was targeted by the United States government, which sought a way to denaturalize and deport her.¹⁰⁹ Because she seemed to have a valid claim to citizenship, the government was worried that arresting her would “add to her prestige,” potentially “bringing her in considerable sums in the way of contributions.”¹¹⁰ The government therefore found another way: it investigated the citizenship of her husband, and found that he had been naturalized before the age of 18. Because the Naturalization Act required applicants to be legal adults, the government could cancel his naturalization even many years later. Goldman, as a woman, lost her claim to citizenship when her husband was denaturalized¹¹¹ and was ultimately deported from the United States in 1919.¹¹²

¹⁰⁷ *Id.* (quoting Hearing on H.R. 4057, H.R. 6238, and H.R. 9825 Before the House Comm. on Immigration and Naturalization, 69th Cong. 22-28 (1926) (statement of Elizabeth Kite, Scholar, Library of Congress)).

¹⁰⁸ See WEIL, *supra* note 80, at 86 (explaining that the “power to commence a denaturalization proceeding was, in fact, quite discretionary. It became, perhaps as an inevitable result, a highly political, often symbolic tool of the U.S. government”).

¹⁰⁹ *Id.* at 57.

¹¹⁰ *Id.* at 58.

¹¹¹ *Id.* at 61 (quoting Emma Goldman: “At first I took this case of the U.S. Authorities of taking away my papers as a joke but now it turns out serious; altogether too serious.”).

¹¹² *Id.* at 63.

After World War I, the United States “entered a period of increased nativism and hostility to immigrants.”¹¹³ The National Origins Act limited immigration from countries deemed less desirable, greatly reducing the number of immigrants from Italy, Russia, and Eastern Europe and “effectively eliminat[ing]” immigration from Japan.¹¹⁴ During this period, the Naturalization Act was also interpreted to exclude large classes of potential citizens. Pacifists and conscientious objectors, for example, were deemed unable to meet the Naturalization Act’s requirement of “attachment to the principles of the Constitution.”¹¹⁵

The 1940s saw significant growth in political denaturalization. Attorney General Robert Jackson first sought to identify and denaturalize members of the German American National League, called the “Bund,” a group sympathetic to Nazi aims.¹¹⁶ The Justice Department submitted to Congress a proposed bill to allow the denaturalization “for conduct that established a foreign allegiance” arising post-naturalization, but the bill was ultimately rejected by Congress after intense lobbying from the American Civil Liberties Union and the Federation of Constitutional Liberties.¹¹⁷

The failure to pass the bill did not dampen the enthusiasm for denaturalization attempts, however. In 1942, Attorney General Francis Biddle created a new program “studying cases of disloyalty among naturalized citizens.”¹¹⁸ In Biddle’s words, denaturalization could be “a most important weapon in dealing with organized subversive and disloyal activities.”¹¹⁹

The government pursued denaturalization cases against Nazi sympathizers—even when those sympathies developed later, after the individual

¹¹³ Jared A. Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 U. PA. J. CONST. L. 489, 523 (2018).

¹¹⁴ *Id.* at 528.

¹¹⁵ *United States v. Schwimmer*, 279 U.S. 644 (1929) (“[O]ne who refuses or is unwilling for any purpose to bear arms because of conscientious considerations . . . is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization.”); Laura M. Weinrib, *Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties*, 65 EMORY L.J. 1051, 1122 (2016).

¹¹⁶ WEIL, *supra* note 80, at 93.

¹¹⁷ *Id.* at 95.

¹¹⁸ *Id.* at 101.

¹¹⁹ *Id.*

had been naturalized in the U.S.¹²⁰ Furthermore, the government made a decision to publicize the program, as it made political leaders look “tough” in wartime, and also was a way of “appearing fair by demonstrating an apparent equality of treatment of Japanese and German Americans.”¹²¹ Of course, as scholar Patrick Weil pointed out, this equality of treatment was an illusion at best—Japanese immigrants were still barred from naturalization at the time, and even native-born Americans of Japanese descent were held in internment camps.¹²²

In addition to the executive branch policy of ramping up denaturalization, Congress also expanded the denaturalization power during this time period. The 1940 Nationality Act provided “the first comprehensive rules governing expatriation.”¹²³ It expanded the behaviors by which citizenship could be lost, for both native-born and naturalized citizens, including such grounds as voting in foreign elections, accepting employment in certain foreign government positions, and, for children, residing for six months or more in a country that counted their parents as citizens—even if the parents had been naturalized in the U.S.¹²⁴ In 1952, additional provisions were added aimed at countering a perceived Communist threat and allowing the denaturalization of individuals engaged in “subversive activities.”¹²⁵

D. The Quiet Period

Ultimately, all of these provisions were intended to unify an American identity. The government’s goal was to exclude those who might be seen as

¹²⁰ See Baumgartner (ultimately holding that the Naturalization Act prohibited denaturalization based on an individual’s conduct and beliefs pre-dating his or her naturalization).

¹²¹ WEIL, *supra* note 80, at 101.

¹²² *Id.*

¹²³ Note, *supra* note 105, at 867.

¹²⁴ *Id.* at 868-869 (noting that the provision for children “has been criticized as being but a fragmentary effort to eliminate dual nationality acquired at birth.”).

¹²⁵ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§1101-1537); see also Note, *Protecting Deportable Aliens from Physical Persecution: Section 243(h) of the Immigration and Nationality Act of 1952*, 62 YALE L.J. 845, 852 (1953) (expecting to see an increase in the number of individuals deported for “subversive activities” resulting from “the broader provisions for deportation on political grounds contained in the McCarran Act”). The Act did, however, finally eliminate laws barring the nationalization of Asians individuals.

disloyal or un-American, or “regarded as prospective ‘fifth columnists.’”¹²⁶ The constitutionality of these grounds for denaturalization, however, was hotly contested. The Supreme Court ultimately adopted greater citizenship protections in a highly divided series of cases.¹²⁷ As discussed more fully in the next Part, that change reduced the number of denaturalization cases initiated by the government.¹²⁸

A changing political environment, however, had an even bigger impact. When the “Red Scare” of the mid-twentieth century receded from public discourse, government officials lost their appetite for pursuing vast numbers of denaturalization cases.¹²⁹ A few cases still went forward, including high-profile cases involving alleged war criminals.¹³⁰ And in the late 1990s, when naturalization procedures were brought within the executive branch’s oversight, the Clinton administration also sought to create administrative procedures for denaturalization.¹³¹ The Ninth Circuit struck down the procedures, however, concluding that although Congress had delegated authority to the Attorney General for naturalization, nothing in the statute delegated authority for *denaturalization*.¹³² The Clinton administration decided not to appeal that ruling, instead choosing to abandon the idea of administrative denaturalization.

Since the early 2000s, no president has attempted to reinstate such a program, and Congress has not provided explicit authority for one; denaturalization continues to require judicial action.¹³³ In practice, however

¹²⁶ Note, *supra* note 123, at 869 (quoting Cong. Rec, Sept. 11, 1940, at 18090); see also Note, *The Attorney-General and Aliens: Unlimited Discretion and the Right to Fair Treatment*, 60 YALE L.J. 152 (1951) (linking wide discretion with an increase in political targeting).

¹²⁷ See *infra* Part III.

¹²⁸ *Id.*

¹²⁹ WEIL, *supra* note 80, at 139, 178, 180 (noting that the Supreme Court became more active in pushing back against denaturalization after “the second Red Scare declined,” but that even in cases where it is still available, government officials “substantially reduced” their reliance on it after 1967, except against “those who have committed the very worst crimes against their fellow human beings.”).

¹³⁰ *Id.*

¹³¹ *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000).

¹³² *Id.* at 1093 (“The delegation that Congress expressly made to the Attorney General was of ‘authority to naturalize’ citizens. There is no express delegation in the statutes to the Attorney General to denaturalize citizens.”).

¹³³ INA § 340(a), 8 U.S.C.A. § 1451(a); see Daniel Levy, U.S. Citizenship and Naturalization Handbook § 14:21 (2017) (“The U.S. attorneys for the district where naturalization took place institute denaturalization proceedings.”).

denaturalization became exceedingly rare. In the half-century between 1968 and 2018, only four denaturalization cases reached the Supreme Court.¹³⁴ After the events of 9/11, some politicians proposed increasing the use of denaturalization as a tool to exclude individuals suspected of engaging in terrorist activity.¹³⁵ Leaders of both political parties spoke up against the proposal, however, arguing that such a policy would violate both the Constitution and valued political norms. By 2013, a scholar specializing in the history of expatriation concluded that denaturalization was largely a policy of the past.¹³⁶

III. The Supreme Court's Limits on Denaturalization

What happened in the courts while the political branches were increasing their reliance on expatriation and denaturalization as a tool of political control? During the middle part of the twentieth century, the Supreme Court overturned a number of denaturalization decisions. Its decisions protected citizenship rights through varying approaches, including procedural due process, substantive due process, and statutory formalism. But it can be hard to draw clear principles from these decisions that would govern in later cases, because the Court was often highly fractured. Some of the most important denaturalization decisions were decided only by a plurality of the Court, with numerous separate writings. But even if the underlying theory of citizenship was fractured, unclear, and subject to change over time, the judgments issued by the Supreme Court nevertheless place real limits on the political branches' ability to wield denaturalization and expatriation as political weapons.

A. Procedural Protection

The earliest—and perhaps most important—limits adopted by the Supreme Court focused on procedural due process. First, the Court adopted a heightened standard of proof for denaturalization cases. In later decisions, the Court reversed a denaturalization that had been decided by default and required a heightened standard of appellate review. In spite of adopting positions favorable to the

¹³⁴ See *infra* Part III.C.

¹³⁵ Peter J. Spiro, *Expatriating Terrorists*, 82 FORDHAM L. REV. 2169, 2170 (2014) (“The bipartisan rejection of such proposals presents a puzzle . . . high-profile efforts to legislate the termination of citizenship in the context of terrorist activities have fallen flat in the United States. There is little chance that these proposals will be resurrected.”).

¹³⁶ *Id.*; see also *id.* at 166 (naming the last chapter of the leading book on denaturalization “American Citizenship is Secured”).

individuals threatened with loss of citizenship, however, the Court was unable to pull together a majority in support of a unified rationale for those decisions. It therefore remains unclear whether these procedural protections are grounded in constitutional due process, or whether they are common-law rules subject to legislative change.

i. *Schneiderman: A Heightened Standard of Proof*

In *Schneiderman v. United States*,¹³⁷ the Supreme Court was faced with a case of alleged naturalization fraud and illegal procurement. William Schneiderman had been a member of the Young Workers League of America and the Workers Party of America before his naturalization.¹³⁸ As part of the naturalization process, he was required to show that he was “attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.”¹³⁹ These two organizations were affiliated with the Communist Party, however, which the district court found to be an organization that is “opposed to the principles of the Constitution and advised, taught and advocated the overthrow of the government by force and violence.”¹⁴⁰ As a result of his membership in the affiliated groups, the court concluded—twelve years after Schneiderman became a citizen of the United States—that he had lacked the requisite good moral character at the time of his naturalization and that his naturalization was therefore obtained illegally.¹⁴¹

The Supreme Court reversed. In the majority opinion authored by Justice Murphy, the Court noted that the government “proceeds here not upon the charge of fraud but upon the charge of illegal procurement.”¹⁴² Schneiderman had not lied about his affiliations; it was only after the fact that those affiliations were charged to be inconsistent with “good moral character” and attachment to constitutional principles.¹⁴³ The government’s position, however, was that he failed to meet the good character requirement at the time of his naturalization and was therefore

¹³⁷ 320 U.S. 118 (1943).

¹³⁸ *United States v. Schneiderman*, 33 F. Supp. 510, 510 (N.D. Cal. 1940), *aff’d*, 119 F.2d 500 (9th Cir. 1941), *rev’d*, 320 U.S. 118 (1943).

¹³⁹ *Id.* at 513.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 165 (Douglas, J., concurring) (“[W]here it has not done so in plain words, we should be loathe to imply that Congress sanctioned a procedure which in absence of fraud permitted a man’s citizenship to be attacked years after the grant because of his political beliefs, social philosophy, or economic theories.”).

subject to revocation of his citizenship. To Justice Douglas, who authored a concurrence, this retrospective review of personal beliefs should be enough to reverse the judgment; according to his opinion, that process was inconsistent with constitutional principles, especially free-speech and freedom-of-conscience protections:

No citizen with such a threat hanging over his head could be free. If he belonged to 'off-color' organizations or held too radical or, perhaps, too reactionary views, for some segment of the judicial palate, when his admission took place, he could not open his mouth without fear his words would be held against him. For whatever he might say or whatever any such organization might advocate could be hauled forth at any time to show 'continuity' of belief from the day of his admission, or 'concealment' at that time. Such a citizen would not be admitted to liberty. His best course would be silence or hypocrisy. This is not citizenship.¹⁴⁴

The Court, however, reversed the judgment on somewhat narrower grounds aimed at procedural due process. It held that the government had not sufficiently proved illegal procurement, because the evidence did not show that Schneiderman personally lacked attachment to the Constitution or believed in governmental overthrow.¹⁴⁵ The Court stated that denaturalization was "more serious than a taking of one's property, or the imposition of a fine or other penalty," and citizenship could not be taken away "without the clearest sort of justification and proof."¹⁴⁶

The Court specified two requirements that the evidence must meet. First, the total quantum of evidence must be sufficient to support the finding—and in this regard, the ordinary civil burden of "preponderance of the evidence" would not be sufficient.¹⁴⁷ Instead, the facts must be proven by "clear, unequivocal, and convincing" evidence.¹⁴⁸ Second, when the evidence lends itself to conflicting

¹⁴⁴ *Schneiderman v. United States*, 320 U.S. 118 (1943) (Douglas, J., concurring).

¹⁴⁵ *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

¹⁴⁶ *Id.*

¹⁴⁷ *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) ("To set aside such a grant the evidence must be 'clear, unequivocal, and convincing'—it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.") (quoting *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887)).

¹⁴⁸ *Id.* at 154.

inferences, those inferences must be drawn to favor the defendant in danger of losing his citizenship:

We hold . . . that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation.¹⁴⁹

Thus, the mere fact that Schneiderman belonged to two groups affiliated with the Communist Party was insufficient to prove his lack of attachment to the Constitution. There was some evidence that the Party supported violent overthrow of the government, but there was countervailing evidence that it sought change by peaceful means consistent with constitutional procedures.¹⁵⁰ Without evidence that Schneiderman himself possessed the disqualifying belief, the district court was bound to infer from the contradictory evidence that Schneiderman did not support violent overthrow.¹⁵¹

ii. *Baumgartner and Knauer: A More Searching Review on Appeal*

Two cases over the next few years would reaffirm the heightened standard of proof and expand the procedural protections to include a more searching review on appeal.¹⁵² But even though the cases reaffirmed and expanded the procedural protections given to defendants in denaturalization cases, they made it clear that the justices were not in agreement about the basis of those procedural protections. Just one year after *Schneiderman* was decided, internal court papers from another denaturalization case—*Baumgartner v. United States*—showed that Justice Frankfurter believed that the standard was simply the ordinary heightened standard for proving fraud in a case at equity.¹⁵³ Certainly, the Schneiderman case

¹⁴⁹ *Id.* at 158.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Baumgartner v. United States*, 322 U.S. 665 (1944); *Knauer v. United States*, 328 U.S. 654 (1946).

¹⁵³ WEIL, *supra* note 80, at 132 (quoting Justice Frankfurter's internal memo: "[T]hat case [Schneiderman] never involved for me any question as to the measure of proof required . . .

had left the basis for the ruling less than clear—and had indeed cited to a fraud case applying the ordinary heightened standard.¹⁵⁴ Justice Murphy, however, believed that the Court had gone further in *Schneiderman*. He took the opportunity in a later concurrence to reiterate his view, pointing out that “[w]e expressly did not pass upon the charge of fraud” in *Schneiderman*, and that “the requirement that the Government prove its case by ‘clear, unequivocal, and convincing’ evidence . . . was a formulation by a majority of the Court of a rule of law governing all denaturalization proceedings.”¹⁵⁵

Although the justices disagreed about the basis for the heightened burden of proof, they nonetheless agreed that it applied in denaturalization cases.¹⁵⁶ The Court further agreed that the heightened standard of proof also required heightened scrutiny on appeal to determine “whether that exacting standard of proof had been satisfied on the whole record.”¹⁵⁷ For the defendant in *Baumgartner*, that heightened standard made a difference. Baumgartner had been accused of harboring Nazi sympathies at the time of his naturalization, and there was evidence that he had spoken in favor of Nazi policies. But under the heightened standard of proof required, the Court held that the record showed “insufficient proof” that he supported fascism when he took the oath of citizenship.¹⁵⁸ As a result, the Supreme Court reversed the underlying judgment and Baumgartner was allowed to keep his citizenship.¹⁵⁹

Two years later, in *Knauer v. United States*, the Court returned to the *Schneiderman* standard.¹⁶⁰ Ultimately, it found that the evidentiary requirement had been “plainly met,” concluding that the defendant was a “thorough-going Nazi and a faithful follower of Adolph Hitler,” who had falsely sworn otherwise at the time of his naturalization.¹⁶¹ Again, however, the Court was not unanimous. Justices Rutledge and Murphy dissented, agreeing that the evidence showed

That fraud requires convincing proof is one of the commonplaces of the law—and hardly seemed to me in question.”).

¹⁵⁴ *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (citing *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887), a fraud case applying such a heightened standard of proof).

¹⁵⁵ *Baumgartner v. United States*, 322 U.S. 665, 678 (1944) (Murphy, J., concurring).

¹⁵⁶ *Id.* at 671.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Knauer v. United States*, 328 U.S. 654 (1946).

¹⁶¹ *Id.* at 660.

Knauer to be “a thorough-going Nazi, addicted to philosophies altogether hostile to the democratic framework in which we believe and live,” but asserting that denaturalization violated constitutional principles.¹⁶² “[C]itizens with strings attached to their citizenship, for its revocation, can be neither free nor secure in their status.”¹⁶³

In both the majority opinion and the dissent, the justices placed great reliance on the heightened evidentiary standard. The majority suggested that the standard was required for due process in a denaturalization proceeding, stating that the consequence of denaturalization could be severe enough to “result in the loss ‘of all that makes life worth living,’” and therefore cannot be left to “conjecture”; otherwise, “valuable rights would rest upon a slender reed” and be vulnerable to shifting political winds.¹⁶⁴ According to the majority, this meant that not only did the trial court have to be persuaded by “‘clear, unequivocal, and convincing’ evidence, which does not leave ‘the issue in doubt,’” but also that the appellate court has a duty to “reexamine facts” found by the lower courts.¹⁶⁵

Justice Rutledge’s dissent agreed, stating that even “if [he] may be wrong” in concluding that denaturalization itself is unconstitutional, “certainly so drastic a penalty as denaturalization, with resulting deportation and exile and all the attendant consequences, should not be imposed by any procedure less protective of the citizen’s most fundamental right [A]t the least this should be done only by those forms of proceeding most fully surrounded with the constitutional securities for trial which are among the prized incidents of citizenship.”¹⁶⁶ He pointed out that loss of citizenship entailed a loss of liberty even greater than incarceration in a criminal action, stating that it is “altogether anomalous that those safeguards are thrown about . . . when, for some offense, his liberty even for brief periods is at stake, but are withdrawn from him when all that gives substance to that freedom is put in jeopardy.”¹⁶⁷

iii. Later Cases: Continued Questions about the Basis for Heightened Procedural Protections

In 1948, the Court again grappled with the basis of the *Schneiderman* ruling—did it create a procedural due process right that could be extended to

¹⁶² *Id.* (Rutledge, J., dissenting).

¹⁶³ *Id.* at 678 (Rutledge, J., dissenting).

¹⁶⁴ *Id.* at

¹⁶⁵ *Id.* 658-59

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

forbid default judgment? A majority of the Court agreed that a judgment denaturalizing August Klapprott by default must be reversed, though the Court was sharply divided.¹⁶⁸ Klapprott was a member of the German American Bund, accused of sympathy to Nazi Germany and disloyalty to the U.S. While his civil denaturalization suit was pending, however, he was arrested and confined to jail on federal criminal charges. His criminal conviction was later overturned by the Supreme Court in a case unrelated to the denaturalization proceeding.¹⁶⁹ He had been unable to afford an attorney to represent him in the civil case, and his incarceration prevented him from appearing personally at the denaturalization trial.¹⁷⁰ As a result, the district court granted a default judgment of denaturalization.¹⁷¹

The Supreme Court reversed the judgment. Five justices agreed with the ultimate result, but they diverged in their rationales. Justice Black wrote the plurality opinion (joined by Justice Douglas). He cited *Schneiderman* for the proposition that “because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt.”¹⁷² In his view, the burden required for denaturalization “is substantially identical with that required in criminal cases—proof beyond a reasonable doubt.” He concluded that the government had not met this standard in the court below.

Justice Rutledge concurred in an opinion joined by Justice Murphy, and would have gone even further; they reiterated their view that denaturalization was unconstitutional in its entirety:

To take away a man’s citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. . . . Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been

¹⁶⁸ Klapprott v. United States, 335 U.S. 601, 602 (1949).

¹⁶⁹ *Id.* at 608.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 612.

held, can be taken away and in its wake may follow the most cruel penalty of banishment.¹⁷³

The plurality viewed this outcome as especially inappropriate in a default judgment, which necessarily lacks the procedural protections of a true adversarial proceeding: “The undenied allegations already set out show that a citizen was stripped of his citizenship by his Government, without evidence, a hearing, or the benefit of counsel, at a time when his Government was then holding the citizen in jail with no reasonable opportunity for him effectively to defend his right to citizenship.”¹⁷⁴

Although Justices Rutledge and Murphy had not been able to get a majority of the Court to sign on for this view, they did agree that *Schneiderman* required, at the very least, substantially heightened due process. They again compared it to the constitutional standard required in criminal cases, writing that *Schneiderman* “required a burden of proof for denaturalization which in effect approximates the burden demanded for conviction in criminal cases, namely, proof beyond a reasonable doubt of the charges alleged as cause for denaturalization,” and that it did so “in view of the substantial kinship of the proceedings with criminal causes,” and with the understanding that “ordinary civil procedures, such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences.”¹⁷⁵ Furthermore, the defendant’s failure to show up to trial did not relieve the government of the need to meet that heightened burden.¹⁷⁶

More than thirty years later, however, there was substantial turnover in the Court—but the Court still seemed at odds over the basis for *Schneiderman*’s procedural protections. In *Vance v. Terrazas*, a Mexican-American dual national was alleged to have voluntarily given up his citizenship.¹⁷⁷ The Supreme Court divided over the question of whether the standard of proof was of common-law origin (and thus subject to being overruled by an act of Congress) or whether it was of constitutional origin.¹⁷⁸ The Court in that case held that the government had

¹⁷³ *Id.* at 617 (Rutledge J., concurring).

¹⁷⁴ *Klapprott v. United States*, 335 U.S. 601, 612–13 (1949).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (1949) (“[I]t is our opinion that courts should not . . . deprive a person of his citizenship until the Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance.”).

¹⁷⁷ *Vance v. Terrazas*, 444 U.S. 252, 266 (1980).

¹⁷⁸ *Id.*

not sufficiently shown that the dual national had intended to expatriate himself, thus allowing him to keep his American citizenship. In dicta, however, a majority of the Court sided with the common-law view of the standard of proof, citing *Schneiderman* as one of several cases that “did not purport to be [a] constitutional ruling.”¹⁷⁹ The Court further distinguished decisions adopting a heightened standard in criminal cases, stating that “expatriation proceedings are civil in nature and do not threaten a loss of liberty.”¹⁸⁰

Again, however, the opinion drew sharp disagreement from those who believed that a heightened evidentiary standard was constitutionally mandated. Justice Marshall wrote that he “cannot understand, much less accept, the Court’s suggestion that ‘expatriation proceedings . . . do not threaten a loss of liberty.’”¹⁸¹ He believed that a “clear and convincing” standard of proof in denaturalization cases was required under the Constitution. Justice Stevens wrote a separate opinion likewise stating that “[i]n my judgment a person’s interest in retaining his American citizenship is surely an aspect of ‘liberty’ of which he cannot be deprived without due process of law. . . . I believe that due process requires that a clear and convincing standard of proof be met in this case as well before the deprivation may occur.”¹⁸²

Just a year later, in *Fedorenko v. United States*, the Supreme Court upheld the denaturalization of a man who had concealed his past as a concentration-camp guard.¹⁸³ In doing so, the Court applied *Schneiderman*’s heightened burden of proof and *Baumgartner*’s more searching appellate review.¹⁸⁴ This time, the Court’s majority opinion implied that such procedural protections were constitutionally

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 272 (Marshall, J., concurring in part and dissenting in part).

¹⁸² *Id.* at 274 (Stevens, J., concurring in part and dissenting in part).

¹⁸³ *Fedorenko v. United States*, 449 U.S. 490 (1981).

¹⁸⁴ *Id.* (“The evidence justifying revocation of citizenship must be “‘clear, unequivocal, and convincing’” and not leave “‘the issue in doubt.’” . . . And in reviewing denaturalization cases, we have carefully examined the record ourselves.”). It is worth noting, however, that Justice Stevens believed the evidence in *Fedorenko* failed to meet this exacting standard; he believed the evidence supported the conclusion that Fedorenko had been forced involuntarily into that position, and that his actions therefore did not disqualify him from citizenship. *Fedorenko v. United States*, 449 U.S. 490, 533 (1981) (“I cannot accept the view that any citizen’s past involuntary conduct can provide the basis for stripping him of his American citizenship.”) (Stevens, J., dissenting).

required: “Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding.”¹⁸⁵

The Court’s back-and-forth over the source of the heightened procedural protections in denaturalization makes it difficult to determine the scope of legislative power—and difficult to predict how future cases will come out. But whether the requirement for a heightened evidentiary burden is grounded in the Constitution or in the common law likely makes little difference for modern cases, as Congress has not adopted a lower standard for denaturalization. Thus, modern denaturalization cases must be guided at least by a “clear and convincing” standard of proof, and the scope of appellate review must be commensurate with the heightened burden of proof.

B. Substantive Constitutional Protections

While the Supreme Court’s cases based on procedural due process dealt with the question of *how* citizenship could be taken away, the Court also decided several cases on substantive grounds that looked at the question of *whether* citizenship could be taken away under certain circumstances. Cases of expatriation—that is, taking citizenship away from individuals even if born in the United States, often as a sanction for conduct deemed inconsistent with citizenship—proved to be particularly divisive, though the Court ultimately held that individuals could not be expatriated without their voluntary consent. The holding was extended in a subsequent case to naturalized citizens. In reaching these decisions, however, the Court was even more divided than it had been on the procedural questions—and once again, the driving force behind that disagreement was an inability to reach a common theory of citizenship.

i. Limiting Expatriation as Punishment

When Congress adopted citizenship-stripping laws aimed at various forms of behavior deemed to be incompatible with citizenship—including voting in a foreign election, serving in a foreign military, leaving the country to avoid U.S. military service, and others—these laws were challenged by individuals unwilling to forfeit their citizenship. *Trop v. Dulles* was an early case in which the Supreme Court was faced with the question of whether citizenship could be taken away as a punitive measure.¹⁸⁶ The petitioner, Albert Trop, was a native-born U.S. citizen who served in Morocco during World War II.¹⁸⁷ During this time, he was sent to a military stockade as punishment for some infraction. He then escaped from the

¹⁸⁵ *Id.* at 505.

¹⁸⁶ *Trop v. Dulles*, 356 U.S. 86, 88 (1958).

¹⁸⁷ *Id.*

stockade, but returned to base and turned himself in after spending less than a day away. Nonetheless, he was court-martialed, convicted of wartime desertion, sentenced to three years' confinement, and dishonorably discharged. Five years after he completed his sentence, he applied for a passport and discovered only then that he had also been stripped of his citizenship and was therefore ineligible to obtain a passport.¹⁸⁸ He filed suit seeking a declaration of citizenship.

When Trop's case reached the Supreme Court, the justices sharply divided over the outcome. A majority of the Court held that Trop's denaturalization violated the Constitution, but less than a majority agreed on the rationale. Chief Justice Warren wrote the opinion for a four-judge plurality, concluding that denaturalization violated the Eighth Amendment's prohibition on cruel and unusual punishment, writing that the individual who is stripped of citizenship "has lost the right to have rights."¹⁸⁹ He explained that denaturalization puts the individual at risk of deportation, causes "the total destruction of the individual's status in organized society," and "strips the citizen of his status in the national and international political community."¹⁹⁰ Taken together, the plurality found these consequences to be "a form of punishment more primitive than torture."¹⁹¹

While the plurality's language was strong, it did not garner a majority of the Court. Justice Brennan declined to join the majority opinion and concurred in the judgment, writing separately that Congress exceeded its authority under the war power because the expatriation was intended as "naked vengeance," and was not reasonably calculated "to further the ultimate congressional objective—the successful waging of war."¹⁹² In less egregious circumstances, however, he suggested that expatriation could be within the war power of the legislative branch.

Justice Frankfurter dissented, joined by Justices Burton, Clark, and Harlan. The dissent argued that denaturalization for wartime desertion fit easily within Congress' war power; it referred to military services as "this ultimate duty of American citizenship," and stated that "Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need

¹⁸⁸ *Id.* (1958) ("In 1952 petitioner applied for a passport. His application was denied on the ground that under the provisions of Section 401(g) of the Nationality Act of 1940, as amended, he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion.").

¹⁸⁹ *Id.* at 101–02 (1958) (Warren, C.J.).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 112–13 (1958) (Brennan, J., concurring).

were to remain in the communion of our citizens.”¹⁹³ The dissent also disagreed that loss of citizenship was the harsh penalty that the plurality and Justice Brennan believed. Instead, the dissent said, expatriation was far less harsh than the death penalty, which was also a potential consequence of wartime desertion; “in truth, [the individual who has lost his citizenship] may live out his life with but minor inconvenience. He may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life.”¹⁹⁴

In 1963, the Supreme Court again turned to the question of expatriation as punishment. Francisco Mendoza-Martinez, a dual U.S.-Mexican citizen, left the United States in 1942 “solely, as he admits, for the purpose of evading military service in our armed forces.”¹⁹⁵ When he returned to the United States, he was arrested and convicted of failing to comply with the selective service laws. After serving his time, he was released—but five years later, the government sought to deport him, alleging that he had lost his citizenship under section 401(j) of the Nationality Act of 1940, which provided that: “A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . . [d]eparting from or remaining outside of the jurisdiction of the United States in time of war”¹⁹⁶

The Supreme Court concluded that the statute was unconstitutional. The majority opinion noted that Congress had a great deal of latitude under the foreign-relations and war powers,¹⁹⁷ and certainly there was a clearer connection to the war power in *Mendoza-Martinez* than there had been in *Trop*—after all, entirely evading the draft is likely to cause greater harm to military objectives than merely spending a few hours off base. Nevertheless, the Court said, the sanction of expatriation was a consequence so serious that it could deprive an individual “of all that makes life worth living.”¹⁹⁸ As a result, it could not follow from a mere civil action: “If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking.”¹⁹⁹ Instead, the Court held, the heightened process of a criminal case would be required before such a serious punishment could be imposed. “[T]he Fifth and Sixth Amendments mandate that this punishment cannot be imposed

¹⁹³ *Id.* at 122 (Frankfurter, J., dissenting).

¹⁹⁴ *Id.* at 110.

¹⁹⁵ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 166-67.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses.”²⁰⁰ The Court acknowledged that its holding might legitimately be criticized for “immunizing the draft evader.” But it prioritized the underlying citizenship interest and the procedures that protect that interest, writing that “the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason.”²⁰¹ Thus, after *Mendoza-Martinez*, expatriation as a sanction for voluntary behavior would require criminal process.

ii. Curtailing Involuntary Expatriation

During the mid-twentieth century, the Supreme Court also struggled with an even more fundamental question: does the Constitution allow citizenship to be involuntarily taken away at all? The question sharply divided both the Court and the public. The Court’s first answer to that question, in *Perez v. Brownell* was “yes.”²⁰² The Court concluded that Congress had the right to pass such an expatriation statute as part of its foreign affairs authority under the Constitution. In a 5-4 opinion, the Court upheld the expatriation of an individual who had voted in a Mexican election, and was therefore held to have expatriated himself.²⁰³

Six years later, however, the Supreme Court shed some doubt on the *Perez* holding in *Schneider v. Rusk*.²⁰⁴ Angelika Schneider was a naturalized American citizen born in Germany. She later married a German citizen and moved with her husband to live there. By the early 1960s, women no longer lost U.S. citizenship merely by marrying a foreigner.²⁰⁵ Nonetheless, Congress had passed a statute providing that naturalized citizens (regardless of gender) who moved back to their country of origin would lose their United States citizenship.²⁰⁶ In *Schneider*, the Court held the statute unconstitutional because it treated native-born citizens more favorably than naturalized citizens.²⁰⁷ The Court noted that “the Fifth Amendment contains no equal protection clause,” but that it does “forbid

²⁰⁰ *Id.*

²⁰¹ *Id.* at 184.

²⁰² *Perez v. Brownell*, 356 U.S. 44, 46 (1958), *overruled in part by* *Afroyim v. Rusk*, 387 U.S. 253 (1967).

²⁰³ *Id.*

²⁰⁴ *Schneider v. Rusk*, 377 U.S. 163 (1964)

²⁰⁵ *See supra* note 102.

²⁰⁶ *Schneider*, 377 U.S. at 168.

²⁰⁷ *Id.*

discrimination that is ‘so unjustifiable as to be violative of due process.’²⁰⁸ In the Court’s opinion, the treatment of naturalized citizens under the statute qualified as just such a violation.²⁰⁹ Native-born citizens, after all, could live abroad with no fear of losing their citizenship.²¹⁰ Treating naturalized citizens differently “creates indeed a second-class citizenship” and “in no way evidences a voluntary renunciation of nationality and allegiance.”²¹¹

In 1967—less than a decade after *Perez*—the Court would return to the question of constitutional power to involuntarily revoke citizenship. This time, the Court would extend the principle it had announced in *Schneider* and formally overrule *Perez*. The case involved Beys Afroyim, a naturalized American citizen who moved to Israel and voted in an election for the Israeli Knesset.²¹² He then sought a declaratory judgment affirming his U.S. citizenship, expressly seeking to overturn the *Perez* case.²¹³ The Court noted that *Perez* had not been well-received; it stated that the case “has been a source of controversy and confusion ever since,” and that the Court’s later cases “as well as many commentators,” had “cast great doubt upon the soundness of *Perez*.”²¹⁴

In *Afroyim v. Rusk*, the Supreme Court—again in a 5-4 opinion—this time adopted the dissenters’ view from *Perez*.²¹⁵ The Court first rejected the idea that “Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent.”²¹⁶ It then grounded its holding more firmly in the first sentence of the Fourteenth Amendment, which provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” The purpose of this amendment, according to the Court, was to firmly establish the right of citizenship

²⁰⁸ *Id.* The opinion cited *Bolling v. Sharpe*, 347 U.S. 497 (1954), for this proposition. The relationship between due process and equal protection at the federal level became known by the shorthand “reverse incorporation,” a concept usually associated with *Bolling*. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 976 (2004).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Afroyim v. Rusk*, 387 U.S. 253, 254 (1967).

²¹³ *Id.*

²¹⁴ *Id.* at 256.

²¹⁵ *Id.*

²¹⁶ *Id.*

and to take it out of the hands of the legislature²¹⁷—particularly in the post-Civil-War era, when legislators might have tried to limit the political rights of individuals formerly held in slavery.²¹⁸ Even though the framers of the Fourteenth Amendment were focused on the end of slavery rather than the permissibility of expatriation, the Court concluded that principles of “liberty and equal justice” expressed in the Fourteenth Amendment required overruling *Perez*.²¹⁹ Indeed, the Court said, “[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.”²²⁰

C. A Retreat to Statutory Formalism

The ruling in *Afroyim* sounded as if it might put the issue of denaturalization to rest once and for all. But even though the decision got a majority opinion, it was still seen as vulnerable by those dissatisfied with the ruling.²²¹ It was, after all, a 5-4 decision reversing a different 5-4 decision less than a decade old.

A year later, after Chief Justice Warren resigned from the Court, observers expected that a change in the Court’s makeup could lead to reversing *Afroyim*. And one case seemed to offer the perfect vehicle: Aldo Bellei, who was born and raised in Italy but possessed American citizenship through his mother, challenged a law that would strip the citizenship of individuals born abroad who failed to live in the U.S. for at least five years between the ages of fourteen and twenty-eight.²²² Indeed, President Nixon’s new appointee, Harry Blackmun, wrote in an early memo to the Court that he was inclined to overrule *Afroyim*.²²³

However, one of the justices who had dissented in *Afroyim* was nevertheless unwilling to overrule it—Justice John Harlan believed strongly in following precedent even when he disagreed with a case on the merits.²²⁴ As a

²¹⁷ *Id.* at 263 (“Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy.”).

²¹⁸ *Id.* at 267-68 (“Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power.”).

²¹⁹ *Id.*

²²⁰ *Id.* at 268.

²²¹ *Rogers v. Bellei*, 401 U.S. 815 (1971).

²²² WEIL, *supra* note 80, at 176.

²²³ *Id.* at 177.

²²⁴ *Id.*

result, the decision in *Bellei* left *Afroyim* undisturbed by walking a narrow textual ground—because the Fourteenth Amendment’s citizenship clause only applies to those “born” or “naturalized” in the United States, the Court held that it did not prohibit the involuntary expatriation of Aldo Bellei, who was a natural-born citizen born in Italy.²²⁵

With the *Afroyim* holding left undisturbed (though narrowly interpreted), fewer denaturalization cases entered the litigation pipeline. In the four decades after *Bellei* reaffirmed the central holding of *Afroyim*, only four cases have reached the Supreme Court. All three of those cases would continue to apply a narrow and formalist approach; none would return to *Afroyim*’s broad statements of “liberty and equal justice.”²²⁶

One of those cases was *Vance v. Terrazas*, discussed above,²²⁷ which interpreted the standard for “voluntary” expatriation. Congress had passed laws providing that certain conduct (voting in a foreign election; serving in a foreign military) was inconsistent with citizenship and would be deemed to provide conclusive evidence that an individual had voluntarily abandoned U.S. citizenship.²²⁸ In *Terrazas*, however, the Supreme Court shut down this approach, concluding that an expatriation action must be supported by evidence of affirmative intent to give up citizenship—intent cannot be inferred from foreign service alone.²²⁹ The decision protected individuals by interpreting “voluntariness” to require an individual intent to give up citizenship—not just an intent to engage in an action that Congress deemed inconsistent with citizenship.²³⁰ Again, however, the opinion was a narrow one taking a very formal interpretation of the relevant language; it did nothing to clarify the underlying constitutional interests at stake.

The remaining three cases dealt with individuals whose naturalization was originally procured illegally or by fraudulent means. Fraud and illegal procurement were the main avenues left open for denaturalization after *Afroyim*, specifically carved out of the reach of the opinion. In a footnote, the *Afroyim*

²²⁵ *Rogers v. Bellei*, 401 U.S. 815, 830 (1971) (holding that the Fourteenth Amendment’s citizenship clause was “restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States” and therefore “obviously did not apply to any acquisition of citizenship by being born abroad of an American parent”).

²²⁶ *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967).

²²⁷ See *supra* Part III.

²²⁸ *Vance v. Terrazas*, 444 U.S. 252 (1980).

²²⁹ *Id.*

²³⁰ *Id.*

majority left open a remaining route for denaturalization: setting aside cases where naturalization had occurred fraudulently or unlawfully.²³¹ Post-1967, this ground became the primary avenue left for denaturalization.

The first case, *Fedorenko v. United States*, involved a defendant who had allegedly served as a concentration-camp guard in Treblinka, Poland during World War II. The government brought a denaturalization suit against Fedorenko, alleging that he fraudulently concealed this background to obtain naturalization. Furthermore, the statute allowing Fedorenko to immigrate to the United States as a “displaced person,” specifically excluded individuals who “assisted the enemy in persecuting” civilians or who “voluntarily assisted the enemy forces.”²³² Fedorenko admitted that he had been a guard at Treblinka, but argued that his actions were involuntary, arguing “that he had been forced to serve as a guard” and denying “any personal involvement in the atrocities committed at the camp.”²³³

The Supreme Court acknowledged that it created two lines of precedent “that may, at first blush, appear to point in different directions.”²³⁴ The first line, the Court said, “recognized that the right to acquire American citizenship is a precious one and that once citizenship has been acquired, its loss can have severe and unsettling consequences.”²³⁵ Thus, denaturalization was required to meet a high burden of proof.

But the other line, the Court said, “recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.”²³⁶ This line, in the Court’s view, required it to uphold Fedorenko’s loss of citizenship based on his misrepresentations even assuming that his work as a guard resulted from involuntary forced labor. Under this very formalist approach, the Court deferred to Congress, “acknowledg[ing] . . . the fact that Congress alone has the constitutional authority to prescribe rules for naturalization,” and that the Court’s role is to “assure compliance” with its exercise of that role.²³⁷ Because Fedorenko’s concealment allowed him to gain an immigration status he would not otherwise have qualified for, he had “illegally

²³¹ *Id.* at 267, n.23 (“Of course, as The Chief Justice said in his dissent, naturalization unlawfully procured can be set aside.”).

²³² *Fedorenko v. United States*, 449 U.S. 490, 490 (1981)

²³³ *Id.*

²³⁴ *Id.* at 505.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 507

procured" citizenship and it must be revoked.²³⁸ Because the Court held that strict compliance with the statute required denaturalization regardless of duress, the Court did not reach the larger question of legal complicity.²³⁹ One commenter writing shortly after the decision was rendered described the *Fedorenko* opinion as "unexpected" and a "totally mechanical exercise."²⁴⁰

Seven years later, the Supreme Court applied a similarly formalist analysis in the denaturalization case of *Kungys v. United States*, which involved an alleged guard at a Lithuanian concentration camp, whose purported actions came to light only when the Soviet Union released videotaped depositions implicating Kungys.²⁴¹ *Kungys* was authored by Justice Antonin Scalia relatively early in his tenure on the Court, and it showcased the textualist approach he would become known for.²⁴² Justice Scalia's opinion was partly a majority opinion and partly a plurality opinion, as the Court yet again fractured in deciding a denaturalization case. This time, however, the fracturing did not reveal a fundamental disagreement about the nature of citizenship; instead, the disagreement centered on relatively minor matters of textual interpretation. In the words of one scholar, "[t]he *Kungys* court, confused and fragmented, finally settled on an odd approach to the problems of the statute and achieved little. . . . Rather than furthering values and larger legislative purposes, the Court wrestled with language until it lost."²⁴³

In the opinion, the Court accepted the finding of the courts below that there was insufficient evidence that Kungys had personally been involved in executing Lithuanian citizens; the district court had found the Soviet-era depositions to be "inherently unreliable."²⁴⁴ However, the evidence did show that Kungys had misrepresented his date and place of birth, as well as his wartime occupation and

²³⁸ *Id.* at 518.

²³⁹ Abbe L. Dienstag, Comment, *Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120, 129 (1982) ("[T]he inherent unsettledness of the duress issue and the combination of war-crime and nationality-law factors present in *Fedorenko* call for careful and considered evaluation of the availability here of the duress defense. The Court, however, did not address itself to these concerns.").

²⁴⁰ *Id.*

²⁴¹ *Kungys v. United States*, 485 U.S. 759 (1988).

²⁴² See Michael Heyman, *Language and Silence: The Supreme Court's Search for the Meaning of American Denaturalization Law*, 5 GEO. IMMIGR. L.J. 409, 421 (1991) (noting that the opinion was authored by "Antonin Scalia, a new member of the Court and a major proponent of the textual approach to statutory interpretation").

²⁴³ *Id.* at 431.

²⁴⁴ *Kungys v. United States*, 485 U.S. 759 (1988).

residence.²⁴⁵ The central question before the Court was whether Kungys's misrepresentations were material to his naturalization.²⁴⁶ On this point, a majority of the Court agreed that a misrepresentation was material if it had a "'natural tendency to influence, or was capable of influencing, the decision of' the decision-making body to which it was addressed."²⁴⁷ Thus, even a relatively minor lie, such as a misstatement about the town of one's birth, could be material if it influenced the naturalization decision.²⁴⁸

Justice Scalia went on to conclude, in a part of the opinion that garnered only four votes, that Kungys's misrepresentation of his birth information had not been shown to be material; whether other misrepresentations might have been material would have to be determined on remand.²⁴⁹ On the second ground for denaturalization—that Kungys's misrepresentations amounted to false testimony demonstrating that he lacked the moral character required for naturalization, and thus "illegally procured" it—the plurality agreed that no materiality requirement was necessary.²⁵⁰ Even a lie that did not itself affect the naturalization decision could demonstrate a lack of moral character.²⁵¹ This point, however, would also be remanded—this time for the lower court to determine whether Kungys's misrepresentations (essentially, false statements contained on application forms) amounted to "testimony" as required by the immigration statute.²⁵²

It wasn't until 2017 that the Supreme Court accepted another denaturalization case. *Maslenjak v. United States* was one of the rarer criminal prosecutions for naturalization fraud.²⁵³ Divna Maslenjak, an ethnic Serb who resided in Bosnia during the civil war of the 1990s, came to the United States as a refugee and gained citizenship in 2007.²⁵⁴ As a refugee, Maslenjak had testified

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 770.

²⁴⁸ For example, lying about the town where one was born could attempt to conceal other potentially disqualifying information—such as a criminal history in that town, or participation in wartime atrocities if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications. *Kungys v. United States*, 485 U.S. 759, 774 (1988).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017).

²⁵⁴ *Id.*

under oath that her husband had spent the war years secreted away, evading military service.²⁵⁵ And when she sought naturalization, Maslenjak stated that she had never given “‘false or misleading information’ to a government official while applying for an immigration benefit.”²⁵⁶ In fact, however, Maslenjak knew all along that her husband had actually served in the Bosnian Serb Army, in a brigade that had participated in the Srebrenica massacre.²⁵⁷ Maslenjak was charged with immigration fraud under 18 U.S.C. § 1425(a), which “makes it a crime to ‘knowingly procure[], contrary to law, the naturalization of any person.’”²⁵⁸ Both the district court and the court of appeals accepted the prosecutors’ interpretation that the statute did not require any showing of materiality—the courts held that the conviction could be sustained by evidence of an intentional misrepresentation in the naturalization process, regardless of whether that misrepresentation led to the naturalization.

Once again, the Supreme Court hewed to a textualist analysis in its review of those decisions. In a unanimous opinion authored by Justice Kagan, the Court concluded that the statute’s language—requiring that an individual “procure” naturalization “contrary to law” impliedly contains a materiality element.²⁵⁹ The Court began with the dictionary definition of “procure,” and analyzed its use in ordinary speech.²⁶⁰ It concluded that the prosecutors’ position “falters on the way language naturally works,” and held that materiality was implied by the language of the statute.²⁶¹ The Court then concluded that on remand, the jury should be asked to consider what impact Maslenjak’s false statement had on the ultimate naturalization decision.²⁶²

In *Maslenjak*, unlike many of the earlier cases, the Court was relatively unified. The Court unanimously agreed on the necessity of a “materiality” finding. Justice Gorsuch joined all but Part II.B. of the Court’s opinion. He issued a concurrence, joined by Justice Thomas, writing that he would go no further than stating the need to instruct the jury regarding materiality on remand, preferring to leave the specifics of that instruction to the district court. Justice Alito filed a separate concurrence, arguing that a statement could be material even if it did not

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 1925.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 1930-31.

ultimately affect the final denaturalization decision, offering an example of a defendant who believes that his or her false statement would procure naturalization—even if that statement did not actually influence the final decision.²⁶³

Only after basing its ruling on the text itself did the Court raise the “disquieting consequences” of the prosecution’s position—if the interpretation were otherwise, prosecutors would have “nearly limitless leverage” and new citizens have “precious little security,” as nearly every immigrant would have a misstatement, however minor, in their application. The application, after all, asks “Have you EVER committed . . . a crime or offense for which you were NOT arrested?”²⁶⁴ At oral argument, this question clearly troubled the justices, as it would seem to allow the denaturalization of anyone who failed to report each and every instance in which they exceeded the speed limit without being pulled over.²⁶⁵ Interestingly, the discussion of this issue was contained within the part of the opinion joined by all nine justices, suggesting that the Court unanimously agreed that undermining the security of naturalized citizens would raise grave constitutional concerns.

But it is just this concern that is now reflected in the *Borgoño* case. Her denaturalization is sought on the basis of an alleged crime for which she had not been arrested at the time of her naturalization application. That crime—looking the other way and continuing to provide ordinary administrative support while her boss was engaged in financial wrongdoing—is likely one that many people in a financially vulnerable position would commit, however, making it harder to argue that her actions demonstrate moral turpitude sufficient to disqualify her from citizenship. Especially given the tight connection between employment and health insurance, even persons of high moral character might find it difficult to risk losing their job by taking a stand against their employers’ fraud.

²⁶³ *Id.* (Alito, J., concurring) (suggesting that materiality “does not require proof that a false statement actually had some effect on the naturalization decision”).

²⁶⁴ *Id.* at 1927.

²⁶⁵ *Maslenjak v. United States*, Oral Arg. Tr. (Apr. 26, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-309_b97c.pdf (“It’s not a serious constitutional question of whether an American citizen can be -- have his citizenship taken away because 40 years before, he did not deliberately put on paper what his nickname was or what -- or what his speeding record was 30 years before that, which was, in fact, totally immaterial. That’s not a constitutional question?”) (statement of Breyer, J.)

IV. The Problem with Civil Denaturalization

It is understandable that after its sweeping constitutional holding in *Afroyim*, the Supreme Court would turn to a more narrow formalism in later cases. After all, the holding in *Afroyim* stood on shaky ground after the decision, and there was valid concern that a new appointment to the Court would swing the pendulum back toward the Court's previous holding in *Perez*. Focusing more narrowly on textual interpretation allowed the Court to maintain the broader constitutional holding over the next fifty years and come to agreement in the cases that followed.

And for the subsequent half-century, the Court's narrower approach did little or no harm to the civil and political rights of naturalized citizens. The number of attempted denaturalizations declined dramatically, as a consequence of both the heightened constitutional protection and a rapid decline in the Red Scare. Not only was Communism seen as less of a threat to the United States' interest, but a respect for civil liberties, freedom of thought, and equal treatment was viewed as the antidote to totalitarian regimes.²⁶⁶ American public discourse presented civil liberties—and the due-process protections backing them up—as essential aspects of what it means to be American.²⁶⁷

The few denaturalizations of alleged Nazi concentration-camp guards and other war criminals during the fifty years between 1967 and 2017 did little to disrupt an overall sense of citizenship security. The American political identity may be complex and variegated, but the ethos of "Never Again" meant that it included no room for those who supported the atrocities perpetrated by the Nazi regime.²⁶⁸ Excluding such individuals from the body politic comported with the

²⁶⁶ See Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 634 (2010) ("The effects of World War II and the Cold War influenced the expansion of criminal defendants' rights between the 1940s and the 1960s, as judges sought to distinguish the treatment accorded by the United States from that of totalitarian countries.").

²⁶⁷ Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 262 (2012) ("In the American mind, judicial process is not merely a means by which we resolve individual disputes; instead, it is a mechanism by which we 'announce to the world something about our beliefs and values and our sense of ourselves and our society.'") (quoting Robert N. Strassfeld, *Responses to Ten Questions*, 37 WM. MITCHELL L. REV. 5133, 5148 (2011)).

²⁶⁸ See Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L.J. 736, 738 (2007) ("Survivors of the Holocaust speak loudly and uniformly of one commandment: Never again: bear witness to injustice, racism, and hate and do what is necessary to prevent them."); ALLAN RYAN, *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* 340 (1984) ("By revoking citizenship, the polity--the American people joined together in a society and a government--

original approach of President Taft's Attorney General, George W. Wickersham, who ordered U.S. Attorneys to refrain from indiscriminately filing denaturalization proceedings against every single citizen for whom naturalization was alleged "to have been fraudulently or illegally procured."²⁶⁹ Good cause for denaturalization existed, he said, only if "some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country."²⁷⁰ By the same token, it sent a message that those who sought refuge from the Nazis in the United States *were* truly American, and would be protected from those who had once persecuted them. As a result, programs seeking to identify and denaturalize former war criminals enjoyed broad support from the American public. Difficult questions about the constitutionality of those programs could therefore go unresolved. But with the return of aggressive denaturalization programs, questions of constitutional legitimacy require an answer.

A. The Procedural Due Process Deficiencies of Civil Denaturalization

One of the most glaring constitutional weaknesses of civil denaturalization was identified by the Supreme Court back in 1943: the lack of procedural due process in ordinary civil litigation.²⁷¹ The return of denaturalization as a political priority brings the issue of due process to the forefront. In 2018, a man was stripped of citizenship without being personally served with process, without making an appearance in the case either personally or through an attorney, and without benefiting from even a contested hearing at the summary judgment stage. He may not, even today, know that he has lost his citizenship rights. Even if nothing in the case violated the Federal Rules of Civil Procedure, the proceedings nevertheless give rise to serious questions of procedural due process.

As discussed above,²⁷² the Supreme Court added some heightened procedural protections beyond what is ordinarily available in civil litigation: the Court required a heightened burden of proof and overturned a denaturalization obtained by the defendant's involuntary default.²⁷³ The Court's language

takes the most solemn and drastic step available to it: the civil equivalent of excommunication.").

²⁶⁹ WEIL, *supra* note 80, at 28.

²⁷⁰ *Id.*

²⁷¹ *Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (requiring "the clearest sort of justification and proof" to take away citizenship).

²⁷² *See supra* Part III.

²⁷³ *Id.*; *Klapprott v. United States*, 335 U.S. 601, 616 (1949).

suggested that the risk of losing citizenship was serious enough to warrant heightened procedure; it required the government to meet a burden “substantially identical with that required in criminal cases,” and asked that this level of proof be met even in cases where the defendant did not make an appearance.²⁷⁴

Not all of the justices agreed that the heightened procedure was constitutionally required—but some did, including most notably Justice Rutledge.²⁷⁵ Justice Rutledge’s concurrence in *Klapprott* emphasized that ordinary civil litigation was insufficient to protect against the erroneous deprivation of citizenship.²⁷⁶ Treating a denaturalization suit “as if it were nothing more than a suit for damages for breach of contract or one to recover overtime pay,” he argued “ignores . . . every consideration of justice and of reality concerning the substance of the suit and what is at stake.”²⁷⁷ He referred to the right of citizenship as “this most comprehensive and basic right of all,” arguing that it should not be subject to “the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights.”²⁷⁸

More than half a century has passed since Justice Rutledge suggested that ordinary civil litigation could not offer the constitutionally required level of procedural due process to defendants at risk of losing their citizenship. In the intervening decades, the Court has refined the doctrine of procedural due process. The Court’s modern doctrinal developments do not cast doubt on Justice Rutledge’s earlier concerns. Instead, they go further, supporting the notion that civil litigation is utterly inadequate to protect the defendant’s liberty interest in citizenship.

The Supreme Court’s current approach to procedural due process was adopted in *Mathews v. Eldridge*.²⁷⁹ The *Eldridge* case applied “what is in essence a cost-benefit analysis, weighing the risk that the plaintiff will be erroneously deprived of liberty against the cost of providing additional procedures to safeguard against such error.”²⁸⁰ To conduct that analysis, the Supreme Court wrote, trial courts must take into account three factors: first, the individual’s

²⁷⁴ *Klapprott*, 335 U.S. at 612 (suggesting that “additional procedural safeguards” may be required, but at a minimum, the government must adhere to the heightened standard of proof “even in cases where the defendant has made default in appearance”).

²⁷⁵ See *supra* Part III.

²⁷⁶ *Klapprott*, 335 U.S. at 616 (Rutledge, J., concurring).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁸⁰ *Manta & Robertson*, *supra* note 307, at 1331.

“private interest that will be affected by the official action”; second, “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and third, “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”²⁸¹ Thus, the court must weigh both the individual’s liberty interest in the outcome of the case and the government’s administrative burden in providing heightened procedure, and the court must evaluate whether adopting such a heightened procedure would offer significant protection against the “erroneous deprivation” of the defendant’s rights.²⁸² Under this standard, a court deciding a denaturalization case would therefore have to look at all three factors. First, what is the individual’s interest in retaining citizenship? Second, what kind of a cost or administrative burden would it create to offer the defendant additional procedural protections? And finally, how much protection would those procedures actually offer—that is, to what extent could we rely on those procedures to protect against the erroneous deprivation of the defendant’s citizenship rights?

Even on a purely individual and instrumentalist level, the right to citizenship is an important one. Citizenship carries with it the right to vote in state and federal elections and the right to carry a passport that allows for international travel.²⁸³ Citizenship also allows individuals to qualify for employment in some government jobs, allows individuals to run for office if they so desire, and makes it easier for people to bring relatives to the United States.²⁸⁴

But the most important aspects of citizenship transcend the merely instrumental. To Chief Justice Warren, citizenship was not just fundamental—it was the most fundamental right from which all the others were derived.²⁸⁵ It is true that the Supreme Court has been inconsistent in its characterization of the

²⁸¹ Mathews, 424 U.S. at 335.

²⁸² Manta & Robertson, *supra* note 307, at 1331.

²⁸³ Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1349 (2011) (“[I]n the turn toward the politics of universalism, something changed: voting became a fundamental right of citizens, closely tied to citizenship itself, that could only be denied or abridged by the state with compelling reason.”); Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have A Case in the Courts*, 123 YALE L.J. FORUM 565, 576 (2014) (referring to passports as “the ultimate and definitive proof of citizenship and identity under international law”).

²⁸⁴ Department of Homeland Security, *Should I Consider U.S. Citizenship?*, <https://www.uscis.gov/citizenship/learners/should-i-consider-us-citizenship>.

²⁸⁵ *Perez v. Brownell*, 356 U.S. 44, 64-65 (1958).

citizenship right, with justices sometimes suggesting that the deprivation of citizenship causes no real harm to the individual, who may still go about his or her life without obvious disruption,²⁸⁶ while other times recognizing that the loss of citizenship threatens to “result in the loss ‘of all that makes life worth living.’”²⁸⁷ But as discussed above, citizenship is about much more than civic duties exercised on an occasional basis, such as voting or serving on a jury; instead, citizenship goes to the very heart of membership in the political polity.²⁸⁸ It is a right to belong, a right to participate in the political life of the country, and a right to feel secure in one’s national identity.²⁸⁹ Whether citizenship is seen as the “right to have rights,” or whether it is viewed more narrowly as a right to participate in the exercise of sovereign authority, its central place in American history cannot be ignored.²⁹⁰ The country, after all, was founded on the ideal of citizens’ exercise of sovereign authority.²⁹¹ Can civil litigation offer adequate protection for those rights? Certainly, the Supreme Court in *Schneiderman* and *Klaprott* thought that at the very least, certain procedures would need to be modified; those cases required a heightened burden of proof and disallowed a default judgment to be granted without an evidentiary hearing. However, current cases show that even these protections are not enough. A summary judgment, entered after the government’s affidavits are simply taken as true, does not offer significantly more protection than the default judgment in *Klaprott*. The *Singh* case demonstrates the problem: the government enters into evidence an affidavit stating that Singh’s failure to show up for asylum hearing more than twenty years ago was a result of intentional fraud. If taken as true, as it was in the one-sided hearing, then the statement meets the “clear and convincing” standard. But to observers outside the courtroom, not bound to accept the government’s statement as true, that conclusion does not lend itself to confidence. What motive would Singh have had

²⁸⁶ *Vance v. Terrazas*, 444 U.S. 252, 266 (1980) (“[E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty.”); *Trop v. Dulles*, 356 U.S. 86, 110 (1958) (Brennan, J., concurring) (“[H]e may live out his life with but minor inconvenience. He may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life.”).

²⁸⁷ *Knauer v. United States*, 328 U.S. 654, 658-59 (1946) (Rutledge, J., dissenting).

²⁸⁸ See *supra* Part IV.A.

²⁸⁹ See Fishkin, *supra* note 283, at 1333-1356 (discussing the connection of citizenship to dignity and equality and explaining how citizenship, through its right to political participation, acts as preservative for all other rights).

²⁹⁰ See Jonathan David Shaub, *Expatriation Restored*, 55 HARV. J. ON LEGIS. 363, 423 (2018) (“Today, citizenship may be better conceived of as the right to participate in the state as a component of its sovereignty, than the right to have rights.”).

²⁹¹ See *supra* Part II.

to lie about his name, when he had never been denied asylum on the merits, and no factual findings had been made as to his particular case?

At an adversarial hearing, that question could have been asked. Perhaps the answer would have pointed toward immigration fraud; perhaps it might have suggested a more innocent explanation. But under the current procedures in play, we have no way of knowing. Did Singh know that he had been sued? If so, was he unable to afford an attorney to represent him? Does he know, even now, that a judgment of denaturalization has been entered against him? Could he have had a factual defense to the suit against him? Without answers to these questions, it is difficult to have confidence in the outcome of the case.

An adversarial hearing, with both parties represented by counsel, would go a long way toward protecting against the erroneous deprivation of citizenship rights. Attorneys prosecuting such cases have admitted as much. By identifying the “benefits” of pursuing a civil case rather than filing charges—including the lack of a jury trial, the availability of summary judgment, and the absence of any right to counsel—they admit that these procedural features make denaturalization easier to obtain. The procedural protections offered in a criminal action make denaturalization more difficult to achieve—and therefore do more to protect against the erroneous deprivation of citizenship.

Eliminating civil denaturalization admittedly comes with costs—financial, administrative, and systemic. The financial and administrative costs arise from handling denaturalization through immigration-fraud proceedings in the criminal justice system, rather than through civil litigation. Naturalization fraud is a felony, and it has been more than fifty years since the Supreme Court held that due process requires an attorney to be appointed in felony cases for individuals unable to afford counsel on their own.²⁹² Criminal procedure likewise ensures that defendants have actual notice of the proceedings against them, including the right to confront witnesses.²⁹³ And unlike the law for civil denaturalization, the immigration-fraud enactment carries a statute of limitations; cases may not be brought after more than ten years after the fact.²⁹⁴ Applying these heightened procedures means that each denaturalization case will cost more to prosecute; the

²⁹² *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”)

²⁹³ U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

²⁹⁴ 18 U.S.C. § 1425 (defining naturalization fraud); 18 U.S.C. § 3291 (prescribing a ten-year statute of limitations).

cost of counsel, and the cost of trial proceedings, will be greater than the cost of a summary-judgment hearing in which only the government appears.

But even if the cost of each proceeding is higher, it is likely that the financial costs will be offset by a lower total number of prosecutions. The statute of limitations in naturalization-fraud cases means that some number of cases will be unprosecutable. And even though the Supreme Court has applied a heightened burden of proof in denaturalization cases, that heightened burden has recently been interpreted as requiring “clear and convincing” evidence, which is still a lower burden than proof beyond a reasonable doubt. Taking these factors together, it is likely that significantly fewer cases could successfully be prosecuted—especially from Operation Janus, which looks back well beyond the ten-year statute of limitations.²⁹⁵ If fewer cases are subject to prosecution, then a reduction in the number of viable cases could offset the increased cost of providing enhanced procedural protections in the cases that remain. Fewer prosecutions, of course, means that some people may “get away” with committing naturalization fraud. But even Attorney General Wickersham realized back in 1907 that many such cases of fraud were not worth pursuing, especially when the individuals offered no risk to the larger society.²⁹⁶

The elements of the due-process analysis work together interdependently and therefore require balancing multiple factors. Establishing a right to counsel and a mandatory notice procedure, for example, means weighing the financial cost of providing these measures against the truth-finding benefits of the adversary process. Applying a heightened burden of proof and imposing a statute of limitations means weighing the risk of erroneous removal of citizenship against the risk of erroneous non-enforcement. Even the best justice system must operate in hindsight; no trial can ensure perfectly accurate fact-finding. In balancing these risks, American courts have generally held that “it is far worse to convict an innocent man than to let a guilty man go free.”²⁹⁷ If the citizenship interest is central to the nation’s foundation and identity—and this Article argues that it is—then both the financial costs and the risk that an occasional individual might wrongfully gain and keep citizenship are a small price to pay to avoid unjustly stripping citizenship from others.

²⁹⁵ See *supra* Part I.

²⁹⁶ See *supra* note 269.

²⁹⁷ *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); see also WILLIAM BLACKSTONE, 4 COMMENTARIES *352 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”); Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (collecting cases and exploring the different courts’ formulations for how to weigh the wrongful acquittal of the guilty against the wrongful conviction of the innocent).

B. Beyond Procedure: The Constitutional Infirmities of Civil Denaturalization

The centrality and importance of the underlying citizenship right extends beyond procedural due process. While procedural due process “asks whether the government has followed the proper procedures when it takes away life, liberty or property,” courts look to the doctrine of substantive due process to determine “whether there is a sufficient substantive justification, a good enough reason for such a deprivation.”²⁹⁸ Of course, these matters are closely related; just as the substantive value of the underlying liberty interest must be weighed in the procedural due process analysis, so too are the availability and adequacy of procedural protections considered in a substantive due process analysis.²⁹⁹ And, of course, substantive due process also interacts with other constitutional protections—which for denaturalization necessarily includes the Citizenship Clause.³⁰⁰ Again, however, civil denaturalization falls far short of constitutional protections.

The Supreme Court’s precedent in *Afroyim* and *Schneider* may be enough to find civil denaturalization unconstitutional. Those decisions, after all, warn against applying different standards to naturalized citizens and those born in the United States.³⁰¹ But denaturalization for fraud and illegal procurement is applicable only to naturalized citizens, not to those born in the United States—the very dichotomy that the *Schneider* Court ruled impermissible when it held that Congress could not denaturalize citizens for living abroad in the country of their birth, as such a requirement by its nature could not apply to native-born U.S.

²⁹⁸ Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

²⁹⁹ Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 *COLUM. L. REV.* 1013, 1019 (2008) (describing the “elusive relationship” between the two as “one of the recurring and unresolved debates in legal theory”).

³⁰⁰ See *supra* Part III; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (“The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.”).

³⁰¹ See *supra* Part III; *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir. 1986) (“*Schneider* and *Afroyim* do stand for the propositions that naturalized and native citizens must be treated equally and that before any citizen can be expatriated or denaturalized there must be a voluntary and intentional act.”).

citizens.³⁰² The *Schneider* court warned that such distinctions risk creating “a second-class citizenship” that discriminates against naturalized citizens.³⁰³

The Fourteenth Amendment’s citizenship clause that supported the holding in *Afroyim* likewise suggests that Congress lacks the power to take away citizenship once it is granted. While it is true that the *Afroyim* court specifically excluded cases of fraud and illegal procurement, the opinion’s logic covers the situations we see today. The underlying concern of *Afroyim* was that denaturalization could be wielded as a political weapon—that a group of citizens “temporarily in office can deprive another group of citizens of their citizenship.”³⁰⁴ And yet that is exactly what we see with Operation Janus and the proposed denaturalization task force: current political expediency supports looking back through the files of individuals naturalized years or decades ago, and, in particular, prioritizing the files of individuals from countries deemed to be less than friendly to the current political leadership.

The Supreme Court’s post-1967 development of substantive due process and equal liberty in cases outside of the denaturalization context strengthens this conclusion. Substantive due process is grounded in the Fifth and Fourteenth Amendments, which forbid depriving a person of “life, liberty, or property, without due process of law.”³⁰⁵ The doctrine asks whether particular restrictions on liberty are constitutionally valid—that is, whether there is “a sufficient substantive justification” for that deprivation of liberty.³⁰⁶ It protects against the arbitrary loss of fundamental rights. Scholar Timothy Sandefur has used Shirley Jackson’s short story *The Lottery* to illustrate the idea of substantive due process.³⁰⁷ In the story, villagers must choose a member to undergo what the reader later learns is a death by stoning. The villagers make their choice of individual through

³⁰² *Schneider*, 377 U.S. at 168; *but see Kairys*, 782 F.2d at 1383 (“But this standard applies only to acts committed after citizenship. Because there are no analogous pre-citizenship requirements for native-born individuals, naturalized citizens are not being treated any differently than their intrinsic differences require.”).

³⁰³ *Id.*

³⁰⁴ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

³⁰⁵ U.S. Const. amends. V and XIV.

³⁰⁶ Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999); *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 *YALE L.J.* 1672, 1807 (2012).

³⁰⁷ Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 *HARV. J.L. & PUB. POL’Y* 283, 297 (2012) (citing Shirley Jackson, *The Lottery* (1949), *reprinted in* SHIRLEY JACKSON: NOVELS AND STORIES 227-35 (Joyce Carol Oates ed., 2010)); *see also* Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 *EMORY L.J.* 1313, 1341 (2016).

a procedure that is scrupulously fair, ensuring that each villager has the same chance to be chosen at random—but the horror of the story is the utter arbitrariness of the ultimate fate. In Sandefur’s words, the story illustrates a “fundamentally arbitrary, yet regular procedure.”³⁰⁸ The essential protection of substantive due process is the protection of the underlying right. Even equitable procedures can violate due process if they arbitrarily deprive individuals of a fundamental right.

The Supreme Court’s most recently articulated the substantive due process test in *Obergefell v. Hodges*, which held that states could not restrict the right to same-sex marriage.³⁰⁹ In *Obergefell*, the Court noted that the first question is whether the liberty at issue can be characterized as a fundamental right.³¹⁰ In determining whether a right is truly fundamental, the Court must consider “central reference to specific historical practices.”³¹¹ Citizenship, as the foundation of voting and political participation (the “preservative of all other rights”) has the requisite important and historical pedigree to qualify as a fundamental right.³¹²

The deprivation of a fundamental right requires a compelling state interest.³¹³ Civil denaturalization fails that test. In contrast to the central role that citizenship has played over the nation’s history, expatriation and denaturalization have played only supporting roles, with the passage of time throwing them into significant disfavor.³¹⁴ For the first century of American life, citizenship revocation

³⁰⁸ *Id.*

³⁰⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.”).

³¹⁰ *Id.*

³¹¹ *Id.* at 2602.

³¹² *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.”); Catherine Yonsoo Kim, Note, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1466 (2001) (“Citizenship, once attained, constitutes a fundamental right.”).

³¹³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (“The theory is that some liberties are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ and therefore cannot be deprived without compelling justification.”) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

³¹⁴ See *supra* Part II.

was a rarity in the political process.³¹⁵ Although its use grew in the early part of the twentieth century, revocation had largely receded by the latter part of that century.³¹⁶ It is hard to imagine a compelling need for a process that is so little used—and, at the same time, so susceptible to the political winds.

That is not to say that there is *no* state interest in civil denaturalization. First, the Supreme Court has noted the importance of protecting Congress' constitutional power to set naturalization requirements; if citizens failing to meet Congress' stated requirements are naturalized nonetheless, then that action would usurp Congress' power.³¹⁷ Second, some have emphasized the importance of deterring immigration fraud.³¹⁸ If naturalization is irrevocable, then perhaps individuals will believe that they have nothing to lose by engaging in fraudulent conduct. Finally, and perhaps most controversially, some have identified an interest in protecting the nation's political fabric against those who mean it harm: during the early Cold War era, that resulted in the attempted exclusion of communists.³¹⁹ In the modern era, it has led to proposals to denaturalize individuals with ties to terrorism.³²⁰

None of these interests can withstand heightened scrutiny, however.³²¹ First, protection of Congress' naturalization power can be accomplished on the front end with careful review of the naturalization application through an administrative process that is likely both less expensive and more systematic in rooting out potential fraud or error. Likewise, whatever disincentives to fraud the denaturalization program might produce are likely vastly overshadowed by the incentives inherent in the system. Even without denaturalization, there are

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Fedorenko v. United States*, 449 U.S. 490, 518 (1981) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.") (quoting *United States v. Ginsberg*, 243 U.S., at 474–475).

³¹⁸ Rainer Bauböck & Vesco Paskalev, *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*, 30 *GEORGETOWN IMMIGRATION. L.J.* 47, 80 (2015).

³¹⁹ *WEIL*, *supra* note 80, at 56.

³²⁰ *Spiro*, *supra* note 135, at 2171 ("As those hostile to the United States retain their citizenship, citizenship will no longer demarcate the boundary between friends and enemies.").

³²¹ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 864 (2006) ("Substantive due process cases, which make up the majority of strict scrutiny applications in the fundamental rights area, survive at a rate (22%) consistent with strict scrutiny more generally.").

tremendous incentives to avoid immigration fraud. Getting caught during the immigration or naturalization process means getting permanently barred from the United States and potentially spending time in prison for immigration fraud.³²² If someone is foolish enough—or desperate enough—to be willing to risk those consequences, they are unlikely to be deterred by the fear that they could be denaturalized years or decades later. Finally, the state interest in protecting the nation’s political fabric is likely served through more narrowly targeted procedures: pursuing criminal actions against actual and attempted terrorist acts to ensure physical safety, while safeguarding civil liberties to allow the marketplace of political ideas to serve the nation’s interests. The lesson of McCarthyism during the Red Scare was that the political fabric of the nation is strongest when political ideas are freely expressed; trying to suppress political disagreement is itself a threat to the American identity and political fabric.³²³

C. Civil Denaturalization’s Threat to Constitutional Democracy

The Supreme Court’s failure to articulate a consistent theory of citizenship leaves the Court’s denaturalization doctrine unmoored from the constitutional foundations of democracy. Chief Justice Warren articulated the connection between constitutional democracy and citizenship in the middle of the century.³²⁴ Warren’s view derived from founding principles enshrined in the Declaration of Independence: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”³²⁵ Under this conception, Warren argued, citizenship reflects the very “right to have rights.”³²⁶ That is, it is not the state that creates the right of citizenship; instead, the citizens themselves possess

³²² INA § 212(a)(6)(C)(i); 8 U.S.C.A. § 1182(a)(6)(C)(i); see also Robert L. Reeves, *Visa Fraud and Waivers*, at <https://www.rreeves.com/immigration-news/visa-fraud-waivers/> (“A finding of fraud under section 212(a)(6)(c) of the INA results in a lifetime bar for future immigration benefits such as a green card and the ability to petition family unless granted a waiver.”).

³²³ See Masumi Izumi, *Alienable Citizenship: Race, Loyalty and the Law in the Age of ‘American Concentration Camps,’* 1941-1971, 13 ASIAN AM. L.J. 1, 20 (2006) (‘in the wake of the McCarthyist fervor, even staunch liberals . . . equated disloyal citizens with enemy aliens. It shows that in the postwar United States, the border between citizens and aliens ceased to exist in terms of civil liberties. Freedom became a privilege that only those whom the government considered loyal enjoyed.”).

³²⁴ *Perez v. Brownell*, 356 U.S. 44, 64 (1958), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253, (1967) (Warren, C.J., dissenting).

³²⁵ *Id.* (quoting The Declaration of Independence para. 2).

³²⁶ *Id.*

sovereignty, delegating to the state “the power to function as a sovereignty” as part of the social contract.³²⁷

Although the Supreme Court has not continued to engage in discussion of citizenship theory, scholars of democratic process have extended the conversation. Shai Levi articulated three traditional theories of citizenship applied by countries around the world: citizenship as security (that is, a state-granted right to permanently reside in a territory, as in the United Kingdom), citizenship as a social contract (founded on the consensual allegiance of the citizen, reflecting the view of United States citizenship expressed by Chief Justice Warren), and citizenship as an ethnonational bond (with Israel presented as “the closest representative of this model”).³²⁸ Rainer Bauböck and Vesco Paskalev expanded further on this approach, offering contrasting conceptions of the fundamental basis of citizenship.³²⁹ One is a state-directed approach in which citizenship is founded on state discretion; under this view, “citizenship policies should primarily serve the goals of the State represented by a democratically legitimate government.”³³⁰ Another approach, however, which historically held sway under the United States constitutional order, views citizenship “as an individual entitlement that is held *against* the State . . . a foundation of individual autonomy analogous to individual property that the State must protect and of which it cannot deprive its citizens without losing legitimacy.”³³¹

The idea of citizenship as part of a social compact that gives rise to an individual right is woven into the fabric of American democracy, and is the only theory consistent with American constitutional structure. As one scholar has written, “[u]nlike Europe’s ethnic and cultural nationalism, American nationalism is basically civic; the United States is an idea-based nation.”³³² Individuals “willing to respect and accept” the political tenets of our constitutional system were welcomed into the American polity; it was the shared commitment to the Constitution and to the political order that it represented that defined a shared

³²⁷ *Id.* (“[T]he citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government.”).

³²⁸ Shai Lavi, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel*, 13 NEW CRIM. L. REV. 404, 408 (2010).

³²⁹ Bauböck & Paskalev, *supra* note 319, at 60-63.

³³⁰ *Id.* at 63.

³³¹ *Id.* (emphasis added).

³³² Liav Orgad, *Creating New Americans: The Essence of Americanism under the Citizenship Test*, 47 HOUS. L. REV. 1227, 1295 (2011).

national identity.³³³ The polity was formed first, before the state gained sovereignty; and upon the nation's founding, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³³⁴

Under Chief Justice Warren's view of denaturalization, the state therefore could not involuntarily denaturalize an individual—especially not as a matter of ordinary legislative policy.³³⁵ After all, if the state's sovereign power existed only as a delegation from its citizens, then how could the state presume to take citizenship away?³³⁶ Such an action would be a usurpation of power. Ultimately, of course, the view originally expressed by Warren would prevail in later Supreme Court cases. As the Court stated in both *Mendoza-Martinez* and in *Schneider*, "the power to expatriate endows government with authority to define and to limit the society which it represents and to which it is responsible."³³⁷ As the Court recognized in those cases, such a view does not comport with the constitutional framework of the United States.

The current denaturalization policies threaten the cohesion of a political structure founded on a sovereign citizenry.³³⁸ In the United States' constitutional democracy, it is the status of citizenship that, in Alexander Meiklejohn's words, establishes an individual as both "ruler" and "ruled"—and thereby provides the basis for political freedom.³³⁹ The Supreme Court in *Afroyim* adopted a similar theory of citizenship, stating that "[c]itizenship in this Nation is a part of a

³³³ *Id.*

³³⁴ U.S. CONST., amend. X.

³³⁵ *Perez v. Brownell*, 356 U.S. 44, 64 (1958), *overruled in part by* *Afroyim v. Rusk*, 387 U.S. 253, (1967) (Warren, C.J., dissenting). ("Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.").

³³⁶ *Id.* ("The Fourteenth Amendment grants citizenship to the native-born . . . I see no constitutional method by which it can be taken from him.").

³³⁷ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 214 (1963); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)

³³⁸ *See* WEIL, *supra* note 80, at 5 ("American citizens, naturalized and native-born, we redefined as possessing sovereignty themselves.").

³³⁹ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 6 (1948) (arguing that in a self-governing society, "[t]here is only one group—the self-governing people. Rulers and ruled are the same individuals."); *id.* at 11 ("We the People . . . make and administer law."); *id.* at 15 ("We, and we alone, are the rulers.").

cooperative affair. Its citizenry is the country and the country is its citizenry.”³⁴⁰ Making the citizenship of naturalized citizens vulnerable to political winds changes the very character of that country—and that is the effect of denaturalization, even when such policies are theoretically targeted at cases of immigration fraud or illegal procurement.

It is no answer to say that not all naturalized citizens will, or even can, be so targeted. The problem is not the number of citizens subject to denaturalization proceedings, but rather the arbitrariness of who is targeted—and the political message that is sent by that targeting.³⁴¹ Combining selective enforcement with race, religion, or national origin—as with Project Janus’s focus on “special interest countries,” for example—gives rise to serious constitutional concerns.³⁴² When the government pursues cases that are neither clear-cut nor morally reprehensible, it is easy for naturalized citizens to identify with denaturalization defendants. Few people would personally identify with a Nazi concentration camp guard. But a grandmother with a rare kidney disease, nervous about keeping her job, who looked the other way when her boss committed financial crimes? Or a non-English-speaking immigrant whose translator may have filed an asylum action under the wrong name, causing him to miss a court date? It is easy for people to imagine themselves in the shoes of many of those at risk of losing their citizenship.³⁴³

That feeling of exclusion creates a chilling effect as individuals fear for their own status. Actions “targeting the foreign-born” have been recognized by scholars as “threaten[ing] the social contract and expos[ing] the vulnerability of immigrants’ rights to political manipulation.”³⁴⁴ It can cause the fears expressed in

³⁴⁰ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

³⁴¹ As journalist Masha Gessen has pointed out in the context of anti-LGBT legislation in Russia, laws that are only selectively enforced are necessarily intended to send a political message. Lane Santy, *8 Things We Learned About Russian American Journalist Masha Gessen*, BUZZFEED NEWS, <https://www.buzzfeed.com/lanesainty/8-things-you-should-know-about-masha-gessen> (“Once you write a law that can only be enforced selectively, then the point of it is not to have legislation, the point of it is to have a message in the public.”); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“The requirements for a selective-prosecution claim draw on ordinary equal protection standards.”) (citation and internal quotation marks omitted).

³⁴² *Armstrong*, 517 U.S., at 464 (“[A] decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.”).

³⁴³ deGooyer, *supra* note 8 (“Fear also threads through people fast, and spreads quickly, especially online. After the immigration agency’s announcement, many naturalized citizens were left questioning the validity of an immigration status they assumed would always be safe.”).

³⁴⁴ Marta Tienda, *Demography and the Social Contract*, 39 DEMOGRAPHY 587, 607 (2002).

earlier cases to come to pass: naturalized immigrants may feel excluded from the body politic, afraid to participate in public life lest they run afoul of individuals in power who might seek to deport them.³⁴⁵ Of course, this was the very consequence that Justice Douglas warned about in *Schneiderman*.³⁴⁶

Ultimately, the loophole for fraud and illegal procurement is not as limited as it might have felt to the *Afroyim* Court when it excluded fraud actions from the case's broad holding. History instructs us—and modern cases confirm—that bureaucratic error and ordinary human frailty give rise to very common vulnerabilities throughout the immigration process. A case filed under the wrong name can be difficult to distinguish from an individual trying to get a second bite at the apple in an asylum proceeding.³⁴⁷ A moment of weakness from an individual in a vulnerable position can raise later questions about “moral character.”³⁴⁸ And, as the justices on the Supreme Court pointed out in the oral argument in *Maslenjak*, minor crimes such as speeding are nearly ubiquitous, and most cases do not result in getting ticketed.³⁴⁹ *Maslenjak*'s materiality requirement can help ensure that some minor violations do not result in criminal prosecution for illegally procuring naturalization. But *Maslenjak*'s standard does not apply in civil cases, and even when there is an analogous materiality provision, it would not help in situations like Singh's or Borgoño's.³⁵⁰

The primary force behind the Supreme Court's protection of citizenship status may simply be a “fear that the state would abuse any denationalization

³⁴⁵ See *Schneiderman v. United States*, 320 U.S. 118, 167 (1943) (“No citizen with such a threat hanging over his head could be free.”) (Rutledge, J., concurring). Along these lines, concerns have risen that the government is using social media to engage in greater surveillance of both citizens and immigrants. See Daniella Silva, *ACLU Demands Records of Social Media Surveillance Under Trump*, NBC NEWS (May 24, 2018), <https://www.nbcnews.com/tech/social-media/aclu-demands-records-social-media-surveillance-under-trump-n877036>.

³⁴⁶ See *supra* note 144.

³⁴⁷ See *supra* Part I.

³⁴⁸ *Id.*

³⁴⁹ *Maslenjak v. United States*, Oral Arg. Tr. (Apr. 26, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-309_b97c.pdf (“If you take the position that refusing to -- not answering about the speeding ticket or the nickname is enough to subject that person to denaturalization, the government will have the opportunity to denaturalize anyone they want, because everybody is going to have a situation where they didn't put in something like that -- or at least most people.”) (Roberts, C.J.)

³⁵⁰ *Maslenjak v. United States*, 137 S. Ct. 1918, 1925 (2017) (“[W]e have interpreted a civil statute closely resembling § 1425(a)—which authorizes denaturalization when, inter alia, citizenship is “illegally procured,” 8 U.S.C. § 1451(a)—to cover that qualifications-based species of illegality.”)

power it is recognized to have.”³⁵¹ Certainly, the very concept of citizenship can also be used as a weapon to attack members of an opposing political party. Suggesting that certain individuals—or members of certain disfavored groups—are not legitimately part of the nation’s citizenry is a way of casting doubt on their right to participate in public life.³⁵² And to the extent that civil and political rights flow from citizenship, it suggests that those civil rights deserve lessened state protection.

Thus, for example, when thirteen Russians were criminally charged in the United States for conspiring to undermine the 2016 U.S. election, Russian president Vladimir Putin attempted to cast doubt on the legitimacy of their Russian citizenship, reportedly saying “‘Maybe they are not even Russians . . . but Ukrainians, Tatars or Jews, but with Russian citizenship, which should also be checked.’”³⁵³

The overtly anti-Semitic message underlying the statement was certainly disquieting, and it was rightly subjected to immediate international pushback.³⁵⁴ But the belief that some legal citizens are not full or “real” members of a society is an idea that is gaining international traction with the rise of ethno-nationalism³⁵⁵—including within the United States, a nation founded on the integration of an immigrant population into the political fabric of the country.³⁵⁶ Thus, for example,

³⁵¹ T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1499 (1986).

³⁵² *Schneiderman v. United States*, 320 U.S. 118, 159 (1943) (“Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times.”).

³⁵³ Nicholas Fandos & Matthew Luxmoore, *After Putin Cites Jews, Democrats Implore Trump to Extradite Russians*, N.Y. TIMES (March 12, 2018), <https://www.nytimes.com/2018/03/12/us/politics/democrats-trump-election-interference-russia-jews.html>.

³⁵⁴ *Id.* (“Many commentators considered it a clear echo of the anti-Semitism that has plagued Russia’s history since at least the 19th century.”).

³⁵⁵ Gideon Rachman, *Donald Trump Leads A Global Revival Of Nationalism*, FIN. TIMES (June 25, 2018), <https://www.ft.com/content/59a37a38-7857-11e8-8e67-1e1a0846c475> (“The nationalists’ dominant issue is usually immigration — and the need to defend the nation against “swarms” of migrants from outside the west.”); Robert J. Shiller, *What’s Behind a Rise in Ethnic Nationalism? Maybe the Economy*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/2016/10/16/upshot/whats-behind-a-rise-in-ethnic-nationalism-maybe-the-economy.html>.

³⁵⁶ Kristina Bakkær Simonsen, *Does Citizenship Always Further Immigrants’ Feeling Of Belonging To The Host Nation? A Study Of Policies And Public Attitudes in 14 Western Democracies*, 5 COMP. MIGRATION STUD. (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5331101/> (“[R]ecent decades’ political debates about the granting of citizenship to immigrants tell another story of

President Trump falsely tweeted: “Just out that the Obama Administration granted citizenship, during the terrible Iran Deal negotiation, to 2,500 Iranians – including to government officials. How big (and bad) is that?”. In fact, the negotiation had not included any deal for citizenship. And if President Trump’s tweet could be charitably read only to mean that such naturalizations had occurred over the same time period, it seriously undercounted the number of Iranian citizens naturalized during that period—in 2015, over ten thousand of them.³⁵⁷

Even if the content of the tweet is demonstrably false, its metamessage³⁵⁸ still matters. And the underlying meaning of the tweet is twofold, focusing on political affiliation as well as national origin: that is, the tweet suggests that both individuals naturalized under a previous political administration and citizens born in Iran should be viewed with suspicion. It echoes Putin’s statement, suggesting that for some people citizenship may be merely a legal technicality and not a fundamental identity shared by all.³⁵⁹

The view that citizenship may be a mere legal technicality undermines a political system founded on the participation of its citizens.³⁶⁰ When this view is combined with efforts to strip away the naturalization of long-time citizens, it becomes even more destructive to the political order and to the foundations of the United States’ constitutional democracy. Impugning the citizenship of individuals based on national origin raises the concern expressed by Alexander Aleinikoff, which is the “fear that the state would abuse any denationalization power it is recognized to have.”³⁶¹

citizenship as a highly contested policy domain, which is not just about rules but also about identity.”).

³⁵⁷ Salvador Rizzo, *Trump Falsely Claims Obama Gave Citizenship To 2,500 Iranians During Nuclear Deal Talks*, WASH. POST (July 4, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/07/04/trump-claims-obama-gave-citizenship-to-2500-iranians-during-nuclear-deal-talks/?utm_term=.0cea40f3d748.

³⁵⁸ Linguist Deborah Tannen’s research separates a speaker’s message (the “[i]nformation conveyed by the meanings of words) and metamessage (“[w]hat is communicated about relationships— attitudes towards each other, the occasion, and what we are saying”). She notes that people’s emotional reactions are more connected to the metamessage than the message. DEBORAH TANNEN, *THAT’S NOT WHAT I MEANT: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS* 29 (1992). See also Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT’L L. 389, 398 (2009) (explaining how the metamessages of statements made by political leaders can shape the public’s understanding of a shared national identity).

³⁵⁹ See Fishkin, *supra* note 289 (discussing the centrality of citizenship to the American identity).

³⁶⁰ See *supra* note 283

³⁶¹ See *supra* note 351.

V. Conclusion

The possibility of civil denaturalization, which lay mostly dormant for fifty years, is increasingly becoming a political reality. As more cases are litigated, courts will have to answer several questions. The first is whether civil denaturalization is constitutional as a matter of substantive due process and of the Citizenship Clause. If so, then what level of procedural protection is required to take away someone's citizenship? Even hardened immigration enforcement advocates should take pause at the idea that a person can lose citizenship without ever being personally served with process, having the opportunity to obtain legal counsel, or even appearing in court. Stripping political rights without adequate procedural safeguards destabilizes the very concept of citizenship by sending the message that naturalized citizens may never be an integral part of the polity. It also upends the fundamental principle of the United States' founding: that the state has only the power delegated to it by its citizens, and has no power to take that citizenship away. If naturalized citizens cannot feel secure in their substantive and procedural rights, natural-born citizens (and especially those considered undesirable by the government for any reason) may not be far behind in losing theirs. Thus, it is time for courts to draw a clear border around citizenship.